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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR.
Petitioners,

v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether statements broadcast during an investigative television news report on a regularly scheduled news program that a private business is "a scam" and that the customers of the business are being "taken . . . totally taken" contain, or imply, a verifiable fact, or can reasonably be understood as assertions of fact about the conduct of the business, so that the statements or implications are not protected against a libel claim by the First Amendment to the United States Constitution under the "verifiability test" announced by this Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

2. Whether a court must take into account the broad social context of a defamatory statement (i.e, whether a statement occurs in a "hard news" format as opposed to an opinion forum such as a critic's review or editorial commentary), when determining if the statement, or its implication, is actionable under the "verifiability test" announced by this Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

3. Whether a statement broadcast during an investigative television news report on a regularly scheduled news program that a private business' product is "unnecessary -- certainly not worth paying for" is "inherently subjective" and does not contain or imply a verifiable factual assertion so that the statement, or its implication, is protected against a libel claim by the First Amendment to the United States Constitution under the "verifiability test" announced by this Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR., *Petitioners,*

v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

The Living Will Center and Merrill G. Hastings, Jr. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Colorado in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Colorado (App., *infra*, 1-a) is reported at 879 P.2d 6 (Colo. 1994). The opinion of the Colorado Court of Appeals (App., *infra*, 35-a) is reported at 857 P.2d 514 (Colo. App. 1993). The opinion of the District Court of Jefferson County, Colorado (App., *infra*, 66-a) is unreported.

JURISDICTION

The Supreme Court of Colorado, en banc, entered its judgment on July 11, 1994 (App., *infra*, 1-a). A motion for rehearing was timely filed and was denied by the Supreme Court of Colorado on September 6, 1994 (App., *infra*, 85-a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves issues concerning the First Amendment to the Constitution of the United States: "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ."

STATEMENT

Petitioners sued NBC Subsidiary (KCNC-TV), Inc., a television station, and its employee, reporter Suzanne McCarroll (Respondents), in the District Court of Jefferson County, Colorado. Petitioners alleged that Respondents' newscast contained defamatory statements concerning the business conduct of The Living Will Center, one of the Petitioners. The District Court of Jefferson County, Colorado, granted Respondents' motion to dismiss, finding the Respondents' newscast to be constitutionally privileged under the First Amendment of the United States Constitution and not actionable in a suit for defamation. The Colorado Court of Appeals reversed the trial court in a two-to-one decision, concluding that terms used in the newscast, when considered in the context of the broadcast as a whole, implied material assertions of fact susceptible to being proved false, and, therefore, the broadcast was not constitutionally privileged. The Supreme Court of Colorado reversed the Colorado Court of Appeals' ruling, in a four-to-three decision, holding that the broadcast statements neither contained nor implied a verifiable fact and could not reasonably be understood as assertions of fact, and, therefore, the newscasts were privileged under the First Amendment to the United States Constitution.

A. FACTS

The Living Will Center was capitalized at $200,000 on January 15, 1991, and eleven employees began telemarketing its products and services on April 7, 1991 with a $60,000 advertising campaign in the Denver metro market utilizing local newspapers, direct mail, radio and television, including a series of sixteen (16) one-minute commercials on Respondent KCNC-TV. Petitioners sell for $29.95 a combination of four products and two services related to the Colorado Living Will and other advance medical directives:

1. A Colorado Living Will form;
2. A Durable Power of Attorney for Health Care form;
3. An Advance Medical Directive form;
4. A Personal ID Card, which replicates in miniature an individual's Colorado Living Will, along with other health care information;
5. Services of a Central Registry; and
6. A subscription to a quarterly newsletter about the right-to-die issue, living wills, and related documents.

The Living Will Center brought this action as a result of two successive news telecasts about the Living Will Center and advance medical directives aired by KCNC-TV on its weekday 4:00 p.m. news program on April 23 and 24, 1991.[1] The first newscast included a statement by Dr.

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[1]The entire text of the two broadcasts is set out as an appendix to the opinion of the Colorado Court of Appeals, Living Will Center v. NBC Subsidiary, 857 P.2d 514, 521 (Colo. App. 1993) (App., *infra*, 53-a).

Frank Marsh, who was presented as a "medical ethicist." He stated, "I think it's a scam." Suzanne McCarroll, the investigative reporter, stated: "He says the medical directive and power of attorney forms are unnecessary -- certainly not worth paying for." Dr. Marsh further stated: ". . . they will send in $29.95 and what they get back is they've been taken -- is what it amounts to -- totally taken." Within 24 hours of the first newscast, Petitioner's daily dollar sales volume plummeted 65% and never recovered.

B. PROCEEDINGS BELOW

Petitioners brought this action in the District Court for the County of Jefferson, State of Colorado, for damages arising out of the television newscasts aired by Respondents. The Respondents filed a motion to dismiss Petitioners' complaint on the grounds that the complaint failed to state a claim upon which relief could be granted. The District Court treated Respondents' motion to dismiss as a motion for summary judgment and entered judgment in favor of Respondents holding that: (a) the substance and gist of the television newscasts is not false; and (b) the statements made by Dr. Marsh are nonactionable opinion under federal law amounting to rhetorical hyperbole and supported by disclosed truthful facts.

On appeal, the Colorado Court of Appeals, in a two-to-one decision, held that Respondents' newscasts implied material assertions of fact capable of verification and thus, the newscasts were not constitutionally privileged speech in an action for defamation. Therefore, the Court of Appeals

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These facts are not in dispute.

reversed the judgment dismissing Petitioners' complaint and remanded with directions.

Respondents petitioned the Supreme Court of Colorado for a writ of certiorari to review the opinion of the Court of Appeals. The Supreme Court of Colorado granted certiorari to determine: (a) whether the Court of Appeals holding is in accord with the applicable precedent of the United States Supreme Court and the Supreme Court of Colorado; and (b) whether the Court of Appeals erred in failing to review the District Court's determination that the substance and gist of the newscasts was true and if so, if that determination was correct.

The Supreme Court of Colorado, in a four-to-three decision, held that the statements in the television newscast are constitutionally privileged since the terms "scam" and "taken" neither contain nor imply a verifiable fact, nor can they reasonably be understood as an assertion of actual fact. Because the Supreme Court of Colorado concluded that the statements in the April 23, 1991 broadcast did not contain or imply verifiable facts, it held that it need not address the second issue for which it granted certiorari, because the truth of the implication of the television newscast cannot be determined. Therefore, the Supreme Court of Colorado reversed the Court of Appeals and remanded the case to that court to reinstate the entry of judgment in favor of Respondents. Three justices dissented and would have affirmed the Colorado Court of Appeals. The Petitioners filed a motion for rehearing which was denied by the Supreme Court of Colorado.

HOW THE FEDERAL QUESTION WAS PRESENTED

The federal question for which Petitioners seek review is whether the Supreme Court of Colorado's ruling is in accord with this Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); specifically, whether the statements in Respondents' television newscast and the implications from those statements contain a verifiable fact or can reasonably be understood as an assertion of fact, whereby the statements and implications would not be privileged under the First Amendment to the United States Constitution.

The applicability of Milkovich was raised in the first instance in the Respondents' Memorandum Brief in Support of its Motion to Dismiss at the trial court level. The applicability of Milkovich was ruled on by the trial court. (App., *infra.*, 82-a) The trial court held that the statements made by Dr. Marsh in the broadcast were rhetorical hyperbole, protected opinion, not assertions of fact, and therefore were not actionable for defamation under Milkovich and the First Amendment to the U.S. Constitution. (App., *infra.*, 82-a).

The application of Milkovich was next raised in both parties' briefs to the Colorado Court of Appeals. The Colorado Court of Appeals ruled on the application of Milkovich in holding that the broadcasts were actionable under the Milkovich "verifiability test" because they contained or implied provably false facts. (App., *infra.*, 46-a).

The Supreme Court of Colorado granted certiorari specifically to consider the federal question, "whether that holding [Colorado Court of Appeals] is in accord with the

applicable precedent of the United States Supreme Court and this court . . ." The applicability of Milkovich was subsequently raised in the Supreme Court of Colorado proceedings in both parties' briefs. The Supreme Court of Colorado concluded that under Milkovich the television newscast did not contain or imply a verifiable assertion of fact nor could it reasonably be understood as an assertion of actual fact, making the television newscast privileged under the First Amendment to the Constitution of the United States. (App., *infra.*, 24-a).

REASONS FOR GRANTING THE PETITION

This Court's decision in Milkovich v. Lorain Journal Co., supra, has led to confusion and conflicting decisions in federal circuits and the highest state courts. The Supreme Court of Colorado's decision is a prime example of this confusion and is a timely opportunity for this Court to clarify the "enigmatic"[2] aspects of the Milkovich decision. The decision is in error because it makes an incorrect application of the principles in Milkovich, and thereby conflicts with decisions of the United States Court of Appeals and other state courts of last resort.

I. THE SUPREME COURT OF COLORADO'S INTERPRETATION OF MILKOVICH IS CONTRARY TO THE HOLDING IN MILKOVICH, CONFLICTS WITH DECISIONS OF THE FEDERAL CIRCUITS AND THE ILLINOIS

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[2]R. SMOLLA, LAW OF DEFAMATION, (Page 6-4, Release #7, January 1994) ("The already complex body of law surrounding the fact/opinion distinction was made significantly more enigmatic in the summer of 1990 with the Supreme Court's ruling in Milkovich v. Lorain Journal Company.")

SUPREME COURT, AND FAILS TO TAKE INTO ACCOUNT THE "HARD NEWS" CONTEXT OF THE BROADCAST.

In the Living Will Center, the Supreme Court of Colorado held that statements made on a television news broadcast calling the Living Will Center "a scam" and stating that its customers were being "taken . . . totally taken" are merely rhetorical hyperbole, and that the substance of the broadcast was that the Living Will Center's products were not a good value at a price of $29.95. The rationale for the decision was that the terms "scam" and "taken" are merely rhetorical hyperbole or imaginative expression and therefore not provably false under the verifiability test announced in Milkovich. No analysis was made of the social context of the statements, i.e., whether a viewer would expect rhetorical hyperbole in the context of a daily "hard news" broadcast.

The Milkovich decision holds that, under constitutional law, statements on matters of public concern, where media defendants were involved, must be provable as false to be actionable.[3] The Court went on to state:

> Next, the Bresler-Letter Carriers-Falwell line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical

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[3]110 S.Ct. at 2706.

> hyperbole" which has traditionally added much to the discourse of our Nation.[4]

Thus, the Milkovich case announced a two-part test for actionable libel: the statement or its implications must be provably false, and the statement must reasonably be interpreted as stating actual facts about the plaintiff. This test is referred to in this petition as the "verifiability test."

The social context of the defamatory statements in the Living Will Center was a regularly scheduled television newscast. The assertions in the broadcast that the Living Will Center was "a scam," and that its customers were being "taken," were not in a context where a television viewer would recognize them as hyperbole, imaginative expression or one's subjective opinion. Daily television newscasts are the quintessential medium where one expects assertions of fact. The average viewer of television newscasts expects to be factually informed of actual events, not to receive imaginative expressions of opinion.[5] The opposite extreme,

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[4]Id. (Citations omitted).

[5]See, e.g., Sunshine Sportswear & Electronics, Inc. v. WSOL Television, Inc., 738 F. Supp. 1499, 1506 (D. S.C. 1989) (Holding that the term "scam" can be identified as either true or false, the court stated, "Finally, when the statements are examined in the broader social context, it is apparent that the viewer is not made aware that the defendants' statements regarding the plaintiffs are protected opinions. To the contrary, the broadcast appears to be an investigative television news report meant to relay factual information to the audience."); Moldea v. New York Times Co., 22 F.3d 310, 313 (D.C. Cir. 1994) (contrasting context of book review with "a hard news story"); Spence v. Flynt, 816 P.2d 771 (Wyo. 1991) cert. denied, 112 S.Ct. 1668 (1992) (Justice Golden's dissent contrasts Hustler magazine article, "akin to an editorial opinion page", with "hard news"); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 (1st Cir. 1992) cert. denied, 112 S.Ct.

where persons expect expressions of opinion are forums such as book reviews, op-ed pages, editorials, letters to the editor, talk shows, entertainment columns and the like.[6]

The confusion as to the proper interpretation of Milkovich and the importance of "social context" has gone so far that one court, the United States Court of Appeals for the District of Columbia Circuit, has even reversed itself on the issue. In Moldea v. New York Times Company, 15 F.3d 1137 (D.C. Cir. 1994) ("Moldea I"), the District of Columbia Circuit held that the Milkovich decision mandated that the broad social context of the allegedly defamatory statement--a book review appearing in the New York Times--should not be considered in determining if statements made in the book review are actionable.[7] The court in Moldea I

2942 (1992) (contrasting theater critic's column with news reports, the court stated, "The nonfactual nature of [the theatre critic's column] is indicated at first glance by the format . . . [which] appeared as a regularly run theatre column, a type of article generally known to contain more opinionated writing than the typical news report.").

[6]See, e.g., Moldea I, supra (book review); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 105 S.Ct. 2662 (1985) (op-ed page); Neish v. Beaver Newspapers, Inc., 398 Pa.Super. 588, 581 A.2d 619 (1990) (editorial); Shiver v. Apalachee Publishing Co., 425 So.2d 1173 (Fla. Dist. Ct. App. 1983) (letters to the editor); National Association of Government Employees v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935 (1980) (talk show); Phantom Touring, Inc. v. Affiliated Publications, supra (newspaper theatre critic's column); Mashburn v. Collin, 355 So.2d 879 (La. 1977) (restaurant review).

[7]See, SMOLLA, LAW OF DEFAMATION; (Release #8 11/94, p. 6-71) (". . . the Court in Moldea I agreed that the context in which the statements were made--the genre of a book review--had no meaningful place in the analysis of whether the statements were factual or

ruled that Milkovich had removed the contextual test developed in Ollman v. Evans[8] and other cases, stating, "our analysis of this case is not altered by the fact that the challenged statements appeared in a book review rather than in a hard news story." Moldea I, 15 F.3d at 1145-46. Later, the court reversed its earlier decision and held that the context of the defamatory statement was important and that Milkovich did not "disavow" the importance of context, but simply "discounted it in the circumstances of that case."[9] The court in Moldea II stated,

> After careful consideration of the Times' petition for rehearing and Moldea's response to that petition, we are persuaded to amend our earlier decision. The original majority opinion was generally correct in it statement of the law of defamation. Unfortunately, that opinion failed to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of text that are capable of a number of possible rational interpretations. While there is no per se exemption from defamation for book reviews, our initial resolution of this case

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nonfactual." emphasis in original).

[8]Ollman v. Evans, supra.

[9]Moldea v. New York Times, 22 F.3d 310 (D.C. Cir. 1994) ("Moldea II").

> applied an inappropriate standard to judge whether the Times review was actionable.[10]

Moldea II analyzed prior U.S. Supreme Court precedent and concluded that it is necessary to analyze the context of a defamatory statement because it is the setting which helps determine whether the meaning of a statement is received literally, or figuratively as rhetorical hyperbole.

> . . . Both Bresler and Letter Carriers rely in large part on the notion that the speech at issue in each case was intended as hyperbole, see Milkovich, 497 U.S. at 20; however, this fact reinforces the importance of context, because it is in part the settings of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them. Thus, the "lusty and imaginative expression of the contempt felt by union members" for a "scab" may lawfully find hyperbolic expression during a strike, Letter Carriers, 418 U.S. at 286, because the context assures that no reader could understand the epithet "traitor" to be a charge that the "scab" has committed the criminal offense of treason.[11]

The confusion surrounding whether Milkovich discounted or removed entirely the significance of social context in verifiability analysis is apparent in the Living Will Center

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[10]Id. at 311.

[11]Id. at 314.

decision. The Supreme Court of Colorado decision remains in conflict with the holding in Moldea II because the Supreme Court of Colorado, like the court in Moldea I, failed to take account of the social context of the statements.

The Supreme Court of Colorado's decision in the Living Will Center did not analyze the issue of the social context in which the defamatory statements occurred nor what the average viewer's expectations were.[12] The decision focused almost exclusively on the factual versus nonfactual standard set out in Milkovich and the more narrow "context" of the statements within the broadcasts as a whole. This was a significant error brought on, in part, by the confusion generated by Milkovich. As one commentator notes in analyzing Moldea II, ". . . in determining whether or not a statement is "factual," one simply must take context into account."[13]

The Supreme Court of Colorado's decision is in error because its failure to analyze the social context of the broadcasts led it to a mistaken result in holding that the statements in the April 23, 1991 newscast are not actionable under Milkovich.

The Living Will Center decision also held that Dr. Marsh's statements were "opinion" based on facts disclosed to the viewer and were thus nonactionable under the "pure"

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[12]Although the Colorado Supreme Court did discuss the "medium" through which a defamatory statement is disseminated in its summary of defamation law, 879 P.2d at 9, it did not consider or analyze the hard news context of the broadcasts in determining what was the viewers' reasonable understanding of the newscasts, including the terms "scam" and "taken."

[13] R. SMOLLA, at 6-80

vs. "mixed opinion" analysis of the Restatement (Second) of Torts, § 566 (1977). The Supreme Court of Colorado interpreted Milkovich as providing protection from defamatory statements whose factual premises are revealed.[14] The application of this principle in the Living Will Center decision is in error, because if the premise that nothing in the newscasts "even remotely suggests that LWC is committing the crime of fraud or that it is engaged in a deceptive commercial practice"[15] is true, a conclusion that the Living Will Center is engaged in "a scam," i.e., a "fraudulent or deceptive act or operation", would be either factually unsupported or an erroneous assessment of the facts and therefore actionable under the Restatement analysis.

> Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.[16]

The decision of the Supreme Court of Colorado that the term "scam" cannot reasonably be understood as stating an actual fact because it is rhetorical hyperbole is directly in conflict with Kolegas v. Heftel Broadcasting Corp., 607 N.E.2d 201 (Ill. 1992). In Kolegas, the Illinois Supreme Court ruled that a statement broadcast by two radio station talk show hosts that Kolegas was "scamming" them was

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[14]NBC Subsidiary v. Living Will Center, 879 P.2d at 12.

[15]Id. at 12.

[16]Milkovich, supra, 110 S.Ct. 2695, at 2706 .

capable of being interpreted as an assertion of fact and that the listening audience could conceivably take the comment as serious, even though the defendant argued that the comments were harmless jokes. The Illinois Court ruled that whether the comment was understood as a joke was a triable issue of fact.[17]

The conflicting decisions in Living Will Center, Kolegas, Moldea I and Moldea II call out for guidance from the Supreme Court of the United States on how a court should, in a principled way, determine whether a statement will be received by an audience as rhetorical hyperbole and imaginative expression. If defamatory statements during a daily newscast like "scam" and "taken . . . totally taken" in the context of a hard news story about a local business can be held non-actionable by a state supreme court simply by labeling the statements as rhetorical hyperbole, without any regard to the social context of those statements, decisions in this area will continue to be completely unpredictable and the outcome of libel actions involving defamatory statements, which might be arbitrarily characterized as "rhetorical hyperbole", will be like a lottery: a matter of the luck of the draw.

II. THE SUPREME COURT OF COLORADO'S HOLDING THAT THE WORTH OF A GIVEN

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[17]The Supreme Court of Colorado's decision in the Living Will Center is also inconsistent with the Supreme Court of Arkansas' finding in Waymire v. DeHaven, 858 S.W.2d 69 (Ark. 1993). The Supreme Court of Arkansas cited Webster's Ninth New Collegiate Dictionary (1986) as defining "scam" as "a fraudulent or deceptive act or operation," and the court held that the "easily ascertainable meaning" of the term was capable of impugning the plaintiff's business reputation.

PRODUCT IS INHERENTLY SUBJECTIVE IS A MISTAKEN INTERPRETATION OF MILKOVICH.

The Supreme Court of Colorado stated in the Living Will Center decision,

> Clearly this implication [that the Living Will Center's product is not worth $29.95] is not a verifiable fact. The worth of a given service or product is an inherently subjective measure which turns on myriad considerations and necessarily subjective economic, aesthetic, and personal judgments.
>
> * * *
>
> As such, we conclude that the truth of this implication need not and cannot be determined. The implication of the two broadcasts is not verifiable and thus, that implication is constitutionally privileged.[18]

This holding, that the worth of a product is "inherently subjective" and not verifiable, is a grave misinterpretation of the Milkovich decision and has adverse implications for business everywhere. If every statement regarding a product's worth is subjective and therefore not actionable, then businesses have no protection against any damaging, highly defamatory statements about the worth of their products. This result cannot be a correct application of the Milkovich test of verifiability.

Other federal courts have found that statements of a product's worth are actionable under Milkovich. In United States Medical Corp. v. M.D. Buyline, Inc., 753 F.Supp.

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[18]879 P.2d at 14.

676 (S.D. Ohio 1990), a medical equipment newsletter contained statements that the plaintiff, a vendor of medical laser equipment and related supplies, "consistently gouges customers on price and service". Id. at 677. Following Milkovich, the court held that the statement that plaintiff overcharged customers was provable as false in that the plaintiff may be able to verify objectively that it did not overcharge customers or gouge them in any other manner. Id. at 679-80. The court also stated that the statement cannot be dismissed as mere "rhetorical hyperbole" having no basis in fact.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

If allowed to stand, the Living Will Center decision would have a chilling effect on the ability of businesses to protect their reputations and products from materially false assertions of fact. The Living Will Center ruling stands for the proposition that a television station can effectively destroy a business during a newscast by using terms that have an ascertainable meaning of fraud and deception, but the broadcaster can escape any accountability by simply characterizing the terms as rhetorical hyperbole. Also, the holding that the worth of a given product is "inherently subjective" and therefore not verifiable could be used by the media to escape accountability for highly damaging false statements about a business' product.

In this age where there is great competition among the electronic media, strong pressure exists to sensationalize news stories, and more and more false reports will occur. This case is an opportunity for the Court to articulate for the lower courts the principles of accountability for defamatory

statements that Milkovich intended, but which are now being misapplied by some lower courts.

While it is important for the media to inform the public of telemarketing scams and other fraudulent schemes, it is also imperative that honest businesses not be denied the opportunity to rebut, through a libel action, false assertions of fraud and deceptive practices. The breathing space for free and sometimes offensive expression, which rightfully enjoys a privileged status under the First Amendment to the United States Constitution, does not require that a direct attack on a business' reputation for honesty and integrity be endured without recourse. The delicate balance recognized in Milkovich between the guarantee of free discussion of public issues and the strong societal interest in redressing attacks on reputation has been upset by the Living Will Center decision.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT, STATE OF COLORADO

NO. 93SC214 July 11, 1994

NBC SUBSIDIARY (KCNC-TV), INC.
and SUZANNE McCARROLL, Petitioners,

v.

THE LIVING WILL CENTER, a
limited liability company,
and MERRILL G. HASTINGS,
JR., Respondents.

Certiorari to the Colorado
Court of Appeals

EN BANC

JUDGMENT REVERSED
AND CASE REMANDED
WITH DIRECTIONS

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CHIEF JUSTICE ROVIRA delivered the Opinion of the Court.

JUSTICE ERICKSON dissents, and JUSTICE KIRSHBAUM and JUSTICE SCOTT join in the dissent.

JUSTICE SCOTT dissents, and JUSTICE ERICKSON and JUSTICE KIRSHBAUM join in the dissent.

In Living Will Center v. NBC Subsidiary (KCNC-TV), Inc., 857 P.2d 514 (Colo. App. 1993), the court of appeals held that a television station and one of its reporter's[1] broadcasts concerning a product marketed by the Living Will Center (LWC) implied material assertions of fact capable of verification and thus, the telecast was not constitutionally privileged speech in an action for defamation. We granted certiorari to determine: (1) whether that holding is in accord with the applicable precedent of the United States Supreme Court and this court; and (2) whether the court of appeals erred in failing to review the trial court's determination that the substance and gist of the broadcasts was true and if so, if that determination was correct.[2] We reverse and remand with directions.

I

LWC markets a packet of information, forms, and services intended to provide its customers with a comprehensive, up-to-date source for drafting and implementing a living will. The packet is sold for $29.95 and consists of a current Colorado living will form; a

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[1]NBC Subsidiary (KCNC-TV), Inc., and reporter Suzanne E. McCarroll will be referred to collectively as NBC.

[2] In its answer brief, LWC argues that the trial court erred in "accepting as true the unsupported assertions of [NBC] in their Motion to Dismiss contrary to Plaintiffs' sworn allegations in the Verified Complaint" and in failing to give LWC "any notice or opportunity to present affidavits, testimony or other evidence."

These questions were never presented to us for certiorari review and we did not grant certiorari to review these alleged procedural errors. Accordingly, we do not address them.

durable power of attorney for health care form; a medical directive form which gives directions to a treating physician regarding specific medical treatment for various medical conditions; a personal identification card which contains a reduced copy of the living will, the location of the owner's living will, the name and address of the person's doctor, and information regarding the holder of the durable power of attorney for use in the event of an emergency. As part of its services, LWC keeps a registry of its customers' names and addresses so they may be apprised of changes in law or medical technology affecting their living wills. Customers also receive a quarterly newsletter that contains information about changes in the law and other developments regarding living wills.

LWC brought this action as a result of two reports about its product which were televised on successive days on KCNC's 4:00 p.m. news broadcast.[3] The first broadcast was introduced as follows:

> Living wills have become a popular and legal way of maintaining some control over your dying days. They allow you to make difficult life and death decisions. Do you want to be kept alive on life support systems? Artificially fed? Hospitals and libraries throughout the metro area offer living will forms free of charge. And now, a new Denver company is capitalizing on the living will trend, charging $29.95. Is it worth it?

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[3] The full transcript of these broadcasts is reprinted as an appendix to the court of appeals opinion. See Living Will Center, 857 P.2d at 521-24.

> News 4's Suzanne McCarroll is here with more on the story.

NBC then reported that some medical ethicists say that this is "really exploiting people's fear of death." After noting that the University of Colorado Health Sciences Center had sent out 10,000 living will forms free of charge, the broadcast included an interview with the president of LWC who stated the form in the packet was "done on a stronger piece of paper." The broadcast went on to state that the president admitted his form was the same as that supplied free of charge by hospitals and libraries, but that he claimed that LWC's print was bigger, came with a quarterly newsletter, a wallet identification card "so people know you have a living will," and a durable power of attorney form. The broadcast then noted that the same form for a durable power of attorney was available free of charge at a local hospital. The broadcast additionally reported that the packet includes a medical directive form which was characterized by LWC's president as a "road map for the patient," but not a legal document.

The broadcast continued with a brief commentary by Dr. Frank Marsh, an employee of the University of Colorado School of Medicine who was represented as a "medical ethicist." His first statement was, "I think it's a scam." The report then summarized his view as follows: "He says the medical directive and power of attorney forms are unnecessary, certainly not worth paying for." Marsh then stated: "[T]hey will send in $29.95 and what they get back is they've been taken--is what it amounts to--totally taken."

The broadcast then stated that many in the medical ethics community say the forms provided free of charge "are

really all you need" to implement an effective living will. The broadcast concluded by noting that LWC's president was neither a doctor nor a lawyer, but an "entrepreneur."

The president of LWC challenged the content of the first broadcast claiming, among other things, that some of the forms were not available at the locations identified by NBC. In response, NBC broadcast another story on living wills and LWC. The second broadcast included a short summary of the first report and stated that, "we showed you one company in town that charged $29.95 for a living will kit. Now that kit includes a living will, a durable power of attorney, and a medical directive form." The second broadcast included Marsh's statement that the medical directive form was unnecessary. The broadcast continued with more information regarding other institutions which provided forms similar or identical to LWC's at little or no cost.

LWC brought this action asserting numerous claims including that NBC's broadcast was libelous. It claimed that virtually the entire broadcasts were defamatory and not constitutionally privileged.[4] NBC filed a motion to dismiss

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[4] At oral arguments before this court, defense counsel noted the difficulty encountered in defending against this suit because it was never entirely clear exactly what language in the broadcasts plaintiff alleged was defamatory. In response to continued questioning to clarify this ambiguity, counsel for plaintiff focused primarily on Dr. Marsh's statements that LWC's product was a "scam" and its customers as being "taken." Plaintiff's counsel also argued that the general tenor or gist of the two broadcasts was defamatory and that a number of factual inaccuracies regarding the availability of certain forms at particular locations was defamatory.

(continued...)

which was converted to a motion for summary judgment and granted by the trial court. The trial court held that NBC's broadcast characterizing LWC's packet as "a scam" and to its customers as being "taken" were constitutionally privileged and thus, not actionable in a suit for defamation. It also concluded that the substance and gist of the broadcasts was true and thus, not actionable in a defamation suit.[5]

The court of appeals reversed, concluding that the terms "scam" and "totally taken," when considered in the context of the broadcast as a whole, implied material assertions of fact susceptible to being proved false. Living Will Center, 857 P.2d at 518-19.[6] It additionally concluded that the gist of each of the broadcasts implied a material assertion of fact capable of being proved false. "Thus," the court of appeals held, "the telecast does not fall within the protection of the First Amendment for statements containing

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(...continued)

Both lower courts focused exclusively on Dr. Marsh's statements and the general tenor of the broadcasts. These are the same remarks and implications that both parties have focused on in their briefs to this court. Accordingly, these are the issues we focus on here. However, because plaintiff has argued that the factual inaccuracies are defamatory, we also consider this claim.

[5] The trial court determined that the broadcasts related to a matter of public interest and therefore, the requirements of falsity and actual malice or reckless disregard of the truth applicable to defamation claims applied to LWC's claims. These determinations are not before us.

[6] The court of appeals stated: "The trial court dismissed plaintiff's complaint based solely on its conclusion that the broadcasts did not imply any statement of material fact susceptible of being proved false. This is the only issue the parties have addressed on appeal, and our review will be limited to that issue." Living Will Center, 857 P.2d at 517.

no provable false factual connotation." Id. at 519. It did not reach the trial court's second conclusion that the substance and gist of the broadcasts was true and not actionable.

II

In order to decide the issues presented we must first identify the appropriate standard for evaluating when defamatory statements are constitutionally protected under the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution and thus are not actionable.

In Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974), the United States Supreme Court stated:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

These words were widely regarded as establishing the principle that statements of "pure" opinion are constitutionally privileged and thus, not actionable in a defamation case. See, e.g., Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.), cert. denied, 479 U.S. 883 (1986); Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983). See also Ollman v. Evans, 750 F.2d 970, 974 n.6 (D.C. Cir. 1984) (citing federal cases recognizing an opinion privilege), cert. denied, 471 U.S. 1127 (1985); Jeffrey E. Thomas,

Comment, Statements of Fact, Statements of Opinion, and the First Amendment, 74 Calif. L. Rev. 1001, 1009 n.52 (1984) (listing state cases recognizing an opinion privilege).

In applying the principle of Gertz, this court like many others adopted a contextual test in order to determine whether a statement was one of fact or opinion. In Burns, we considered: first, whether the statement is cautiously phrased in terms of apparency; second, the entire published statement in context, not just the objectionable word or phrase; and third, all the circumstances surrounding the statement, including the medium through which it is disseminated and the audience to whom it is directed. Burns, 659 P.2d 1360 (quoting from Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980)). We also noted, however, that not all statements of opinion are constitutionally privileged. Rather, we held that "opinions which imply the existence of an undisclosed defamatory factual predicate may support a cause of action in defamation . . . . when 'the average reader or listener or viewer perceive[s] the comment as essentially an assertion of fact . . . .'" Id. (quoting Alfred Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1234 n.133 (1976)). See also Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth.").

After our decision in Burns, however, the United States Supreme Court decided Milkovich, where it rejected the "artificial dichotomy" between fact and opinion and repudiated any "so-called opinion privilege wholly in addition" to existing first amendment protections. Id. at 19,

24.[7] Nevertheless, the Court reasoned that in order to insure "uninhibited, robust, and wide-open" debate on matters of public concern, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation," or which "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," continues to receive full constitutional protection. Id. at 20 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)).

Under the Milkovich standard, therefore, a court must determine whether the statement contains or implies a verifiable fact about the plaintiff and second, whether the statement reasonably is susceptible to being understood as an assertion of actual fact. In so doing, the factors identified by the Burns court for distinguishing between facts and opinions remain applicable under the Milkovich test. See, e.g., Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir.) (Burns-type factors relevant in applying Milkovich standard), cert. denied, 112 S.Ct. 2942 (1992); Partington v. Bugliosi, 825 F. Supp. 906, 919 (D. Hawaii 1993) (Milkovich does not "represent a departure from established Ninth Circuit law"); Lyons v. Globe Newspaper Co., 612 N.E.2d 1158, 1163 (Mass. 1993) ("nothing in Milkovich requires us to alter the principles of [Massachusetts] law . . . ."). See also The Supreme Court -

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[7] The Court explained that the often-quoted passage from Gertz, when read in context, "was merely a reiteration of Justice Holmes' classic 'market place of ideas' concepts." Milkovich, 497 at 18. As such, the Court concluded that the "passage from Gertz was [not] intended to create a wholesale defamation exception for anything that might be labeled 'opinion.'" Id.

- Leading Cases, 1989 Term, 104 Harv. L. Rev. 129, 219 (1990) ("Because the criteria used by lower courts . . . to distinguish fact from opinion are consistent with Milkovich's limitations, the law of defamation will remain essentially the same . . . ."). But see Weller v. American Broadcasting Companies, Inc., 283 Cal. Rptr. 644, 649 (Cal. App. 1991) (suggesting that Milkovich lessened the constitutional protection provided for "Opinions").

In fact, the majority's reasoning and analysis in Milkovich strongly support the conclusion that the factors identified in Burns remain applicable under Milkovich. Moldea v. New York Times Co., 1994 WL 159559 (D.C. Cir. May 3, 1994) (amending its earlier decision and concluding that Milkovich cannot be read to have "abandoned the principle of looking to the context in which speech appears" when determining if it is constitutionally privileged). The Milkovich court reasoned that recognition of an "opinion" privilege was unnecessary to insure freedom of speech because "the breathing space which freedoms of expression require in order to survive . . . is adequately secured by existing constitutional doctrine . . . ." Milkovich, 497 U.S. at 19 (citations and quotations omitted). In so holding, the Court specifically endorsed the Bressler-Letter Carriers-Falwell line of cases. In each of those decisions, the court expressly considered the statements as a whole, as well as the broader social context in which they arose.[8] The Milkovich court considered whether the

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[8] Justice Brennan, in his dissenting opinion in Milkovich, noted that the majority's analysis demonstrated the continued applicability of the factors applied in Burns:

statements at issue were the sort of loose, figurative, or hyperbolic language which would negate the impression that the statements were factual, as well as the general tenor of the statements in determining they were not constitutionally privileged. Milkovich, 497 U.S. at 20-21.

Consequently, we conclude that the analysis adopted in Burns remains applicable in determining whether allegedly defamatory statements are constitutionally privileged. In determining whether such a statement is actionable, a court must determine whether the statement is one "of opinion relating to matters of public concern which does not contain a provably false factual connotation," or which "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." Milkovich, 497 U.S. at 20. In making this inquiry, relevant considerations include the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a determination of whether the statement implies the existence of undisclosed facts which support it. Milkovich, 497 U.S. at 18; Burns, 659

> Among the circumstances to be scrutinized by a Court in ascertaining whether a statement purports to state or imply "actual facts about an individual" . . . are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made.

Milkovich, 497 U.S. at 24 (Brennan, J., dissenting). While agreeing with the majority's legal conclusion, he rejected the Court's narrow application of these facts to the statements at issue in Milkovich.

P.2d at 1360. See also Sunshine Sportswear & Elec. Inc. v. WSOC Television, Inc., 738 F. Supp. 1499 (D. S.C. 1989).

Whether allegedly defamatory language is constitutionally privileged is a question of law and a reviewing court must review the record de novo to insure that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression. Milkovich, 497 U.S. at 17; Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984); Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315, 318 (Colo. 1981).

III

Applying these standards to the broadcasts at issue here, we are convinced that the terms "scam" and "taken" as well as the substance and gist of the broadcasts neither contain or imply a verifiable fact nor can they reasonably be understood as an assertion of actual fact about LWC's product. Therefore, we hold that the broadcasts are constitutionally privileged.

A

The first statement complained of by LWC, "I think it's a scam," is phrased in terms of Dr. Marsh's estimation regarding the worth of LWC's product. It is an expression of his belief that the packet is not worth $29.95. This is made clear given that his statement uses the language of apparency: "I think." While a statement of belief or opinion may imply the existence of a false and defamatory fact, Milkovich, at 20, Marsh's subjective evaluation of the packet's worth does not carry any such implication. To the contrary, it is nothing more than his judgment that people need not pay for a living will packet because they can get a living will free: He stated that the power of attorney and

medical directive forms "were not necessary," expressed his advocacy of the use of living wills, and his assessment that persons seeking to adopt a living will "don't need to pay a penny--not one red cent" to do so.

The fact that the term "scam" can, as plaintiff argues, be defined, does not change this conclusion. Webster's Ninth Collegiate Dictionary defines a scam as "a fraudulent or deceptive act or operation." Id. at 1047 (1990).[9] However, the question is not whether the statement can be defined (after all, all words can be defined), but whether the statement contains or implies a verifiable assertion of fact or can reasonably be understood as stating an actual fact. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).

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[9] In her dissenting opinion, Judge Rothenberg argued that the term "scam" was privileged because it constituted rhetorical hyperbole. As supporting authority for this conclusion Judge Rothenberg cited, inter alia, the following:

> Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 728 (1st Cir. 1992) (critic who described musical comedy version of Broadway show as a "rip-off, a fraud, a scandal, a snake-oil job" did not commit libel because commentary was "figurative and hyperbolic" and there is "no objective evidence to disprove it:' terms "fake" or "phony" similarly unprovable since they "admit of numerous interpretations"); McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987) ("The lack of precision makes the assertion 'X is a scam' incapable of being proven true or false.").

Living Will Center, 857 P.2d at 521 (Rothenberg, J., dissenting).

Nothing in the broadcasts generally, or in Marsh's statement in particular, even remotely suggests that LWC is committing the crime of fraud or that it is engaged in a deceptive commercial practice. To the contrary, he is simply expressing his estimation of the worth of that product, and doing so in figurative and hyperbolic terms. In Milkovich, the Supreme Court expressly endorsed a line of prior cases which "provide[] protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetoric hyperbole' which has traditionally added much to the discourse of our Nation." Milkovich, 497 U.S. at 20. As used by Dr. Marsh, the term "scam" amounts to nothing more than a subjective judgment regarding the value of the LWC packet, expressed in imaginative and hyperbolic terms, and as such, it neither contains or implies a verifiable fact nor can it reasonably be understood as an assertion of actual fact. See infra pp. 22-23.

Reading the statement in context supports this conclusion. The broadcast explains in some detail the content and purposes of LWC's packet and provides information on where some of the forms contained in that packet can be obtained at little or no cost. The broadcast indicates that while not everything in the packet is available from those sources, everything that one "really needs" to implement a living will is. In this context, Marsh's estimation that the sale of the packet is a "scam" only reinforces what the phrasing of the statement itself indicates: a living will can be acquired at little or no cost, LWC charges $29.95 for its packet which enables the purchaser to obtain a living will, and given these facts, Marsh believes

that the packet is not worth $29.95. In addition, the broadcast summarizes the view of Marsh and others as follows: "it's not that there is anything wrong with these forms [in the LWC packet], they are just saying that $29.95 is an unnecessary charge for a service provided free of charge in the community." There is no suggestion that LWC is perpetrating a fraud or deceiving the public with respect to its product. Rather, the broadcast simply notes the cost of LWC's product and compares it with alternative sources for obtaining a living will.

Finally, Marsh's statement was based on facts disclosed in the broadcast, i.e., the price of LWC's packet, its content, and the availability of a living will and power of attorney forms elsewhere. The viewers were alerted to the fact that LWC's packet contained forms, information, and services in addition to the forms available at little or no cost; however Marsh's opinion, which was formed after "reviewing the forms [in the packet]," was based on the judgment that the living will form alone "was all you really need" to execute a valid living will. Thus, his opinion was based on facts disclosed to the viewer. There is no hint that it was based on undisclosed information. Viewers were in a position to evaluate Marsh's views, and were free to form a judgment about LWC's product that differed from his.

> [Milkovich] unquestionably excludes from defamation liability not only statements of rhetorical hyperbole -- the type of speech at issue in the Bressler-Letter Carriers-Falwell cases -- but also statements clearly recognizable as pure opinion because their factual premises are revealed. Both types of assertions have an identical impact on readers

> -- neither reasonably appearing factual -- and hence are protected equally under the principles espoused in Milkovich.

Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 731 n.13 (1st Cir.), cert. denied, 112 S.Ct. 2942 (1992).

In short, the broadcast provided sufficient information for viewers to answer for themselves the question which opened the broadcast: "Is it worth it?"

When analyzed under the test articulated above, the statement "I think it's a scam" does not contain or imply a verifiable fact nor can it reasonably be understood as an assertion of actual fact about LWC's product. Accordingly, we conclude that the statement is constitutionally privileged.

B

For similar reasons, we conclude that Marsh's statement, "they will send in $29.95 and what the get back is they've been taken--is what it amounts to--totally taken," is also constitutionally privileged. Again, the statement reflects Marsh's judgment regarding the desirability of purchasing LWC's packet. Characterizing the purchase of LWC's packet as being "totally taken" is nothing more than a rhetorical and hyperbolic expression of Marsh's view that a valid and effective living will can be acquired at little or no cost and therefore, it is simply not worth paying $29.95 to achieve this end. As the broadcast itself stated, Dr. Marsh "advocates the use of living wills, but he does not advocate paying for the practice."

IV

The second issue on which we granted certiorari is whether the court of appeals erred in failing to review the

trial court's determination that the substance and gist of the two broadcasts was true and if so, whether that determination was correct. The question is premised on the conclusion that the substance and gist of the two broadcasts implied a verifiable assertion of fact. Because we conclude that the substance and gist of the two broadcasts, like Marsh's statements, does not imply verifiable facts, we need not address whether the court of appeals should have reviewed the trial court's finding that the implication of the broadcasts was true, because the truth of that implication cannot be determined.

The court of appeals concluded that the substance and gist of the two broadcasts contained a verifiable implication and identified that implication as follows:

> [A] company with no expertise is packaging and selling information, forms, and services which, individually or collectively, are not worth paying anything for, because everything in the packet can be obtained at little or no cost elsewhere or is unnecessary to meet the needs of the public. The report . . . implies that everything in plaintiff's package worth paying anything for has been fully disclosed during the telecast.

Living Will Center, 857 P.2d at 520.

We conclude that the court of appeals erred in its identification of the implications of the broadcasts.

The court of appeals concluded that the first broadcast implied that LWC is a "company with no expertise . . . ." on the grounds that LWC's president was characterized not as a lawyer or doctor, but an

"entrepreneur." An entrepreneur is defined as "the organizer of an economic venture. . . ." Webster's Third New International Dictionary 759 (1986). Only by imputing an unwarranted pejorative connotation to that term can the implication identified by the court of appeals be drawn. After all, Henry Ford could be, and often is, characterized as an entrepreneur, but who would think that doing so implies that the Ford Motor Company has no expertise in manufacturing automobiles? Furthermore, the broadcast expressly states the views of Marsh and others as opining not "that there is anything wrong with these forms [in the LWC packet]," but only "that $29.95 is an unnecessary charge for a service you can provide or find free of charge in the community." Thus, not only does the implication drawn by the court of appeals not follow from use of the term "entrepreneur," the statement "that there is [not] anything wrong with the forms" in the packet clearly negates any conceivable negative implication that might flow from that term.

The court of appeals concluded that the second broadcast implied this same verifiable fact. In reaching that conclusion, however, it failed to identify any language which either expressly or implicitly supports this conclusion, and LWC points to none. Furthermore, we are unable to discern anything in the second broadcast which raises such an implication. Accordingly, we conclude that the broadcasts do not imply that LWC is a company "with no expertise" in developing the product it sells.

Similarly, the court of appeals erred in concluding that the broadcasts implied that the packet "was not worth paying anything for." (emphasis added). This is made clear by noting that the broadcasts expressly informed viewers that

"the Harvard Medical School sends out a living will packet for $5.00." Thus, the implication was not that LWC's packet was not worth paying anything for, just that it was not necessary to pay $29.95 to obtain a living will which could either be acquired free or at a nominal charge. Moreover, while the first broadcast stated that the forms provided free of charge in the community were "all that you really need," it neither stated nor implied that the additional forms or services provided with LWC's packet were entirely worthless. It might be true to say that a "for sale" sign is all one really needs to sell a home, but this statement does not imply that the services of a real estate agent are not worth paying anything for. The same principle holds true here. The broadcasts do not imply that LWC's packet was not worth paying anything for.

Finally, we disagree with the court of appeals that the broadcasts implied the verifiable fact "that everything in plaintiff's package worth paying anything for has been fully disclosed during the telecast." The broadcasts specifically noted that a number of forms and services were provided with LWC's packet that were never represented as being available from other sources at little or no cost. To the extent that the broadcasts implied that everything worth paying for had been disclosed, this implication was based on the judgment that the living will form was all that was needed to implement a living will. Thus, we conclude that the broadcasts did not imply that anything worth paying for in the packet had been fully disclosed.

In contrast to the court of appeals conclusion, we hold that the gist of the two broadcasts does not contain or imply a verifiable assertion of fact nor could it reasonably be understood as an assertion of actual fact. Thus, we conclude

that the gist of the two broadcasts is constitutionally privileged. Accordingly, we need not address whether the gist of those broadcasts is true.

The implication of each of the broadcasts is that it is not worth paying $29.95 for LWC's packet (the sale of which is a "scam") in order to properly implement a living will because that can be achieved by getting the forms necessary to do so at little or no cost (i.e., those who pay $29.95 for the packet are being "taken").[10] The implication arises from the juxtaposition of the disclosed facts that living will forms were available at little or no cost from local hospitals and libraries, that many medical ethicists were of the opinion that this form was all that was needed to implement a valid living will, and that LWC charged $29.95 for its product. The broadcast begins by raising the question, "Is it worth it?" The implication is that it is not.

Clearly this implication is not a verifiable fact. The worth of a given service or product is an inherently subjective measure which turns on myriad considerations and necessarily subjective economic, aesthetic, and personal judgments. Is it worth it to have the personal identification

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[10] The trial court concluded that the implication to be drawn from each of the telecasts was that "there are alternatives [to LWC's product] available at substantially less cost or no cost that accomplish the same purposes and ends." We disagree. The implication of the telecast was broader than this. For instance, the telecast indicated that LWC's packet included a newsletter, central registry, and identification card "so people know you have a living will." There was never any indication, however, that these same things were available elsewhere. Thus, it was not implied that the "same purposes and ends" were available form other sources but only that alternatives were available at substantially less cost or at no cost for executing a living will -- the implication being that it is not necessary to pay $29.95 for the packet.

card, durable power of attorney, and newsletter even though the only thing one "really needs" to execute a living will is a living will form? Is it worth paying that amount for the convenience of having a company send one its living will packet if one does not have the time or motivation to visit a local hospital and get a form for oneself? The answers to these questions clearly are not verifiable. As such, we conclude that the truth of this implication need not and cannot be determined. The implication of the two broadcasts is not verifiable and thus, that implication is constitutionally privileged.

V

We turn last to plaintiff's argument that a number of factual inaccuracies in the two broadcasts are defamatory. The plaintiff argues that not all of the forms identified in the report as being available at particular locations were in fact available there[11] and that not every aspect of the packet was fully disclosed in the broadcasts.

Assuming, as we must on a motion for summary judgment, that not all of the forms identified in the broadcasts were available at the locations mentioned, see Dawson v. Reider, No. 93SC83, slip op. at 4 n.2 (Colo., April 11, 1994), this fact cannot conceivably be regarded as defamatory to LWC. As common sense suggests, an allegedly defamatory remark is not actionable if it cannot reasonably be understood as an assertion of actual fact pertaining to the plaintiff. See Restatement (Second) of Torts § 564 (1977) ("A defamatory communication is made

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[11] It is not disputed that living will forms that are virtually identical to the form provided by LWC were available at a number of the locations identified in the NBC reports.

concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer"). Whether or not a given hospital provides a particular form cannot reasonably be understood as a defamatory remark about LWC.[12]

As for the allegation that LWC was defamed by NBC's failure to fully describe each and every feature and aspect of the LWC packet, we again fail to see how providing limited, though accurate, information about the packet can be regarded as a defamation of LWC under the facts of this case. Furthermore, we decline to condemn or condone the editorial judgments of NBC in determining the scope and specificity of these broadcasts. In this respect, the observations of the Eight Circuit in Janklow v. Newsweek, 788 F.2d 1300 (8th Cir. 1986), are instructive:

> Every news story (like every judicial opinion) reflects choices of what to leave out, as well as what to include. We can agree that this story would have been fairer to [plaintiff] and

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[12] Of course thee factual inaccuracies may be relevant inasmuch as the availability of living will forms similar or identical to those contained in LWC's packet is what constitutes the basis for the implication that the packet is not worth paying for and explains Dr. Marsh's judgment that the sale of the packet is a "scam" and its consumers are "taken." However, plaintiff does not contend that no living will forms are available free of charge or that those free forms are significantly different from that provided by LWC. In fact, the exhibits attached to plaintiff's verified complaint clearly would negate such an assertion. While any factual inaccuracies in the broadcasts may reflect on NBC's credibility and accuracy in reporting, they do not change the essential fact that the implication of NBC's report and the judgments of Dr. Marsh are based on disclosed (though partially inaccurate) facts, nor do they have any defamatory connotation with respect to LWC.

> more informative to the reader if the chronology . . . had been more fully explained. . . . Courts must be slow to intrude into the area of editorial judgment not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must almost always be left to writers and editors. It is not the business of government.

Id. at 1306. See also Lauderback v. ABC, 741 F.2d 193 (8th Cir. 1984), cert. denied, 469 U.S 1190 (1985); Saens v. Playboy Enterprises, Inc., 653 F. Supp. 552, 572 (N.D. Ill. 1987); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977).

VI

The broadcast statements of Dr. Marsh are constitutionally privileged because they neither contain or imply a verifiable fact nor can they reasonably be understood as an assertion of actual fact. The implication of the two broadcasts is constitutionally privileged because it is not a verifiable fact nor can it reasonably be understood as an assertion of actual fact. Accordingly, the judgment of the court of appeals is reversed and the case remanded to that court with directions to reinstate the trial court's entry of summary judgment in favor of NBC.

JUSTICE ERICKSON dissents, and JUSTICE KIRSHBAUM and JUSTICE SCOTT join in the dissent.

JUSTICE SCOTT dissents, and JUSTICE ERICKSON and JUSTICE KIRSHBAUM join in the dissent.

NBC Subsidiary v. Living Will Center, No. 93SC214

JUSTICE ERICKSON dissenting:

I dissent because I would affirm the court of appeals in Living Will Center v. NBC Subsidiary (KCNC-TV), Inc., 857 P.2d 514, 517 (Colo. App. 1993), and remand for further proceedings. I agree with the majority's exposition of the law concerning the actionability of a claim for defamation. However, the trial court erred in denying the plaintiffs the opportunity to develop the factual predicate for their claim before ruling on the defendants' motion to dismiss. Accordingly, I respectfully dissent.

The defendants filed a motion to dismiss that the trial court treated as a motion for summary judgment. Based solely on the complaint, the trial court ruled that the publication of the statement that the business was a "scam" as well as the statement that people were being "taken" were constitutionally protected opinions. As a result of this ruling, the trial court entered summary judgment for the defendants. The plaintiffs appealed and the court of appeals held that the trial court erred because: "The trial court dismissed the plaintiff's complaint solely on its conclusion that the broadcasts did not imply any statement of material fact susceptible of being proved false." Living Will Center, 857 P.2d at 517. Accordingly, the court of appeals reversed and remanded for further proceedings.

In its answer brief to this court, the Living Will Center (LWC) asserts that the trial court entered summary

judgment based on unsupported and incomplete assertions of fact and claims that it was denied the opportunity to establish the actionability of the claim. The majority dismisses this contention, however, because the issue was not presented to us for certiorari review. See Maj. op. at 3 n.2. In my view, the adequacy of the record to support the entry of summary judgment is the first issue that must be resolved. The trial court's entry of summary judgment when factual questions were unresolved was reversible error. See Civil Service Comm'n v. Pinder, 812 P.2d 645, 649 (Colo. 1991) (stating that summary judgment is a drastic remedy and proper only when there is no genuine issue of material fact); Schuster v. Zwicker, 659 P.2d 687, 690 (Colo. 1983) (noting the discretionary authority to review cases under C.A.R. 1(d) notwithstanding the failure to preserve an issue); Jones v. Dressel, 623 P.2d 370, 373 (Colo. 1981) (holding that summary judgment is a drastic remedy not available when there remain genuine issues of material fact).

In this case, none of the parties had the opportunity to address the issues relevant to the determination of the actionability of the defamation claim under the standards developed in Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983). The factors identified in Burns that establish whether reasonable people would believe that the statement was one of fact, i.e., the phrasing, the context, and the circumstances surrounding the statement, all require evidence to facilitate the legal determination of the trial judge. Actionability requires review of the relevant evidence of the statement's broader context. Here, the trial court stayed all discovery at the request of the defendants and did not consider matters outside of the pleadings. Therefore, the trial court denied LWC access to the defendants' original

unedited video and audio tapes, and deprived LWC of the opportunity to present affidavits, testimony, or other evidence. Although LWC appended several exhibits to its complaint, the pleadings were not enough to establish as a matter of law that the reasonable person standard set forth in Burns was met. For the reasons set forth in Justice Scott's dissent, I also join his dissent. Because summary judgment precluded the plaintiff from establishing the constitutional foundation required in Burns, the court of appeals should be affirmed.

I am authorized to say the JUSTICE KIRSHBAUM and JUSTICE SCOTT join in this dissent.

NBC Subsidiary v. Living Will Center, No. 93SC213

JUSTICE SCOTT dissenting.

Today, contrary to our rules of civil procedure the majority permits trial courts to dismiss civil actions for defamation by grant of a motion for summary judgment, without permitting the opponent of such a motion the opportunity to establish whether a genuine issue of material fact exists. The majority reaches its holding after a fact-based analysis, including examination of "the context" in which the statement appears and "the circumstances surrounding its publication," maj. op. at 13. Because our rules of procedure counsel against premature dismissal on motions for summary judgment, I respectfully dissent from the majority's opinion and its judgment. In light of the procedural posture of this case, I would affirm the judgment of the court of appeals with directions to return the case to the trial court for further proceedings.

In my opinion the trial court erred in ruling on NBC's motion for summary judgment, after converting it from a motion to dismiss, without giving the Living Will Center (LWC) an opportunity to present affidavits, testimony, or other evidence in opposition to the defendant's motion. I recognize that this issue was not specified for review in our grant of certiorari, see maj. op. at 3, n.2, however, we are to review the trial court's summary judgment order, which necessarily requires an examination of the standard applied as well as the procedure utilized by the trial court in granting that order.

The majority opinion accurately sets forth the facts regarding the claim. However, a brief review of the procedural posture surrounding the trial court's decision to

grant the motion for summary judgment is helpful. On May 9, 1991, LWC filed a forty-five page verified complaint which incorporated by reference some 25 exhibits, consisting of 65 pages of text plus a videotape of the two broadcasts which are the subject of this action. Discovery was simultaneously commenced as LWC served with the complaint a first set of interrogatories, requests for production, and requests for admissions. A second set of interrogatories was served on NBC on May 30, 1991. However, on June 20, 1991, NBC moved for a protective order and on July 1, 1991, the trial court imposed a stay upon discovery by LWC, pending a ruling on NBC's motion for a protective order. The stay order remained in effect throughout the entire course of the litigation.

Shortly after the trial court stayed discovery, NBC filed a motion to dismiss LWC's complaint for failure to state a claim upon which relief could be granted pursuant to C.R.C.P. 12(b)(5). Without notifying the parties and without providing any opportunity to respond by affidavit or to engage in discovery, the trial court converted the Rule 12(b)(5) motion into a motion for summary judgment pursuant to C.R.C.P. 56, and granted the motion.

It is settled law that a court may not consider matters outside the allegations in the complaint when ruling on a motion to dismiss for failure to state a claim. C.R.C.P. 12(b); Dunlap v. Colo. Springs Cablevision, Inc., 829 P.2d 1286, 1290 (Colo.1992). If matters outside of the pleadings are presented to and not excluded by the trial court, a Rule 12(b)(5) motion shall be treated as one for summary judgment pursuant to C.R.C.P. 56. C.R.C.P. 12(b); Dunlap, 829 P.2d at 1290. Where a motion to dismiss is converted to a motion for summary judgment, the court

should given notice and a reasonable opportunity to present affidavits, documentation, and all other material pertinent to a motion made under Rule 56. C.R.C.P. 12(b); Dunlap, 829 P.2d at 1290; Wheeler v. Hurdman, 825 F.2d 257, 260 (10th Cir.), cert. denied, 484 U.S. 986 (1987); Nicholas v. United States, 796 F.2d 361, 364 (10th Cir. 1986); Ohio v. Peterson, 585 F.2d 454, 457 (10th Cir. 1978), affirmed after remand, 651 F.2d 687, cert. denied, 454 U.S. 895 (1981); Davis v. Howard, 561 F.2d 565, 571 (5th Cir. 1977); see also Moore's Federal Practice, § § 12.09(3) & 56.02(3).[1]

Without fair notice to LWC, the trial court converted the motion to dismiss to a motion for summary judgment. Regardless of whether this conversion was appropriate, see Willer v. City of Thornton, 817 P.2d 514, 521 (Colo. 1991) (finding that there are circumstances where matters outside of the pleadings have not been presented or considered by the court, where a motion to dismiss may still be treated as a motion for summary judgment), the trial court was then obligated to provide notice to the parties and to allow LWC an opportunity to oppose the summary judgment motion. Instead, reasoning that the discovery sought by LWC was not relevant to the grounds on which summary judgment was granted, the trial court granted the motion and found that

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[1]Unlike the federal rules, the Colorado Rules of Civil Procedure do not specify how many days notice must be provided the party defending a motion for summary judgment. In most other respects, Rules 12 and 56, C.R.C.P., are virtually identical to their federal counterparts.

"plaintiff has been given a reasonable opportunity to present all material pertinent to the motion."[2]

A trial court's speculation as to what information LWC might obtain through discovery had the stay been lifted to permit a free and fair opportunity to oppose the motion cannot be a valid rationale for its grant of summary judgment. In Finn v. Gunter, 722 F.2d 711 (11th Cir. 1984), the Eleventh Circuit Court of Appeals was faced with a situation similar to that presented in the instant case. The trial court converted a motion to dismiss into a motion for summary judgment and granted the motion without providing notice to the parties. On appeal, the court rejected the contention that the party opposing the motion would not have provided additional relevant information in opposition to the motion had notice been provided. The court held as follows:

> Appellee argues that Finn has already provided everything that he could. Appellant says there is additional material that can and will be filed. What is important is that Finn must be given an opportunity to present every factual and legal argument available. Proper procedures must be followed. We will not speculate on what action the parties will take nor the possible ruling by the trial court. Nor

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[2]Summary Judgment was granted based on the trial court's determination that the overall gist of the broadcast was true and that the comments made by Dr. Marsh were not reasonably interpretable as actual assertions of verifiable fact. The trial court found that the discovery requested by LWC was relevant only to the state of mind of the reporter who relayed the story, an issue not pertinent to the reasons for the dismissal.

> do we make any comments upon the merits of the claims presented.

Id. at 713.

In my opinion, the majority's affirmance of the trial court's holding serves to erode the stringent procedural protections contemplated by our rules of procedure and which must be afforded a party defending against a motion for summary judgment.

Summary judgment is a "drastic remedy" and should be granted only upon a clear showing that there is not genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56; Peterson v. Halsted, 829 P.2d 373 (Colo. 1992). Summary judgment is only proper when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact. Civil Service Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991). Because it results in a final decision on the merits, dismissal of an action under summary judgment bars subsequent actions on the same claim.[3] Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir.

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[3]Unlike a ruling on a motion to dismiss pursuant to C.R.C.P. 12(b)(5), a ruling on a motion for summary judgment is a determination on the merits of the case. As stated in Finn,

> A motion to dismiss may result in a rejection of the complaint but it does not finally resolve the case. When this type of motion is before the court, counsel are generally addressing questions of law. A summary judgment, on the other hand, carries far greater impact since it results in a final adjudication of the merits. "The very intimation of morality when summary judgment is at issue assures us that the motion will be rebutted with every factual and legal argument available."

1987). As a consequence, the non-moving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992).

Where such a drastic remedy is at stake, a trial court should resolve the issue against a full and complete factual record. Masri v. Wakefield, 602 F.Supp. 404 (D. Colo. 1983). This court has previously held that a refusal to grant a reasonable continuance to permit discovery before granting summary judgment is reversible error. Miller v. First National Bank of Englewood, 399 P.2d 99, 101 (Colo. 1965).

In this case, the trial court unfairly deprived LWC of the opportunity to defend itself against a judgment on the merits of the case. The record -- limited by the stay -- is insufficient to allow a determination as to whether there is a genuine issue of material fact. Mere argument contained in a memorandum in opposition to a motion to dismiss is a far cry from "material made pertinent" by a motion for summary judgment; the material made pertinent by the summary judgment rule includes such things as depositions, answers to interrogatories, admissions on file, affidavits and the like. Peterson, 585 F.2d at 457 (10th Cir. 1978).

I am at a loss as to what authority exists to support the trial court's grant of summary judgment premised upon speculation as to what information LWC would seek to discover. I express no opinion on the ultimate judgment of the trial court. I simply believe that summary judgment

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(Citation omitted) (emphasis added).

should not have been granted without affording LWC notice and an opportunity to oppose the summary judgment motion.

Accordingly, I respectfully dissent. I also join the dissent of Justice Erickson.

I am authorized to say the Justice Erickson and Justice Kirshbaum join in this dissent.

COLORADO COURT OF APPEALS

No. 92CA0139 February 11, 1993

The Living Will Center, a Limited Liability Company,

Plaintiff-Appellant,

v.

NBC Subsidiary (KCNC-TV), Inc. and Suzanne E. McCarroll,

Defendants-Appellees.

Appeal from the District Court
of Jefferson County
Honorable James D. Zimmerman, Judge
No. 91CV1686

Division III
Opinion by JUDGE BRIGGS
Criswell, J., concurs
Rothenberg, J., dissents

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

Bloom Murr & Accomazzo, P.C., Eric P. Accomazzo, Denver, Colorado; Edward Dale Parrish, P.C., Dale Parrish, Denver, Colorado, for Plaintiff-Appellant

Holme Roberts & Owen, Kevin Michael Shea, Jon Bernhardt, Denver, Colorado; Anne H. Egerton, Marjorie Nieset Neufeld, Burbank, California, for Defendants-Appellees

Plaintiff, The Living Will Center, appeals the summary judgment dismissing its complaint against defendants, NBC Subsidiary (KCNC-TV), Inc., and one of its reporters - Suzanne McCarroll. Plaintiff's complaint included claims of libel, violation of the Colorado Consumer Protection Act, disparagement of plaintiff's business products and services, and tortious interference with a prospective economic advantage and business opportunity. Plaintiff contends the trial court erred in dismissing the complaint on the basis that statements in two television broadcasts referring to the sale of plaintiff's products as a "scam" and to its customers as being "taken" were mere hyperbole and that the broadcasts were constitutionally protected. We reverse and remand for further proceedings.

Plaintiff is a Colorado company in the business of selling products and services relating to advance decisions and directions for health care. Plaintiff asserts it provides customers with a thoroughly comprehensive, up-to-date, single source of information, forms, and services to enable individuals to make decisions and give directions in advance on choices for medical treatment in the event the individual becomes unable to do so.

Plaintiff began its business operations in 1991 with $200,000 in capital. In April of that year, its employees began a $60,000 television advertising campaign. Plaintiff's products and services were marketed as a package for $29.95.

The package consists of a current Colorado living will form; a durable power of attorney for health care form; a medical directive form which gives directions to a treating physician regarding specific medical treatment for differing medical conditions; and a personal identification card which

contains a reduced copy of the living will, the location of the owner's living will, the name and address of the person's doctor, and information regarding the holder of the durable power of attorney, for use in the event of an emergency.

As part of the package, plaintiff includes the customer's name and address in a central registry by which people with living wills and related documents can be apprised of any changes in laws or medical technology affecting their living wills. In addition, the customer receives a subscription to a quarterly newsletter with information about any changes in the law and other developments relating to living wills and the legal right to make decisions about dying. The package includes information about the forms and services.

The subject of plaintiff's action are two different news reports about its product which were televised on successive days on KCNC's 4:00 p.m. news program. The full transcripts of the newscasts are included in the Appendix.

In the first newscast the newscaster introduced the segment by describing plaintiff as a company "capitalizing" on the living will trend. The reporter, defendant McCarroll, stated that some in the business of medical ethics say this is "really exploiting people's fear of death." After noting that the staff at the University of Colorado Health Sciences Center had sent out 10,000 living will forms free of charge, there was a clip from a videotaped interview with plaintiff's president in which he stated his form was "done on a stronger piece of paper."

Following this, the reporter stated that plaintiff's president had admitted his form was the same as one

supplied free by hospitals and libraries, but that he claimed his print was bigger and that it came with a quarterly newsletter, a wallet identification card "so people know you have a living will," and a form for appointing a durable power of attorney. She then reported that the same form for a durable power of attorney was available free of charge at the C.U. Health Sciences Center. This segment concluded with the reporter noting that the packet includes a medical directive form, then cutting to a clip of plaintiff's president explaining this form was not a legal document, but a "road map for the patient."

Defendants juxtaposed this portion of the telecast with the brief commentary of a Denver doctor employed at the University of Colorado School of Medicine, who was represented on the broadcast as a "medical ethicist." His first statement on the telecast was, "I think it's a scam." The reporter then summarized the doctor's opinion: "He says the medical directive and power of attorney forms are unnecessary, certainly not worth paying for." Then the doctor stated, "[a]nd they will send in $29.95 and what they get back is they've been taken - is what it amounts to - totally taken."

The reporter later stated, "[T]hose in the medical ethics community say the living will forms offered free of charge are really all you need. If there's anything else you wish to add, simply add it." After listing other sources for the living will forms, the broadcast concluded by pointing out plaintiff's president was not a doctor or lawyer, but rather an "entrepreneur."

The telecast the next day included a brief summary of portions of the first report. Defendant McCarroll stated that the day before "we showed you one company in town that

charged $29.95 for a living will kit. Now that kit includes a living will, a durable power of attorney, and a medical directive form."

The reporter represented that the doctor interviewed in the prior report had stated that the medical directive form was unnecessary. She did not mention that the doctor had also described the durable power of attorney form as unnecessary. She did report that "as of today" University Hospital was no longer providing the form for a durable power of attorney.

The remainder of the telecast consisted of more information regarding other entities which allegedly provided forms supposedly like plaintiff's, but again at little or no cost. Those entities included Porter Memorial Hospital, Denver Public Library, Harvard Medical School, Journal of American Medical Association, University Hospital, and Colorado Health Science Center.

Plaintiff claims on appeal that within 24 hours after the telecasts its dollar sales volume plummeted 65% and has never recovered.

After plaintiff filed its complaint, the court granted defendants' request for a stay of discovery pending a ruling on their motion for a protective order. Defendants then filed a motion to dismiss on the basis that the facts asserted in the broadcasts were substantially true and the opinions expressed were constitutionally protected.

In dismissing the complaint the trial court determined that, as a matter of law, the telecasts related to a matter of public interest and that, as a result, the requirements of falsity and actual malice or reckless disregard of the truth applicable to the claim for defamation were applicable to all

of plaintiff's claims. Plaintiff has not challenged these determinations on appeal. The court then concluded that the substance or gist of the telecasts was true and that the statements that plaintiff's business was a "scam" and that people were being "taken" were constitutionally protected opinion supported by disclosed facts.

I.

Plaintiff contends the trial court erred in concluding that the substance or gist of the telecasts neither contain nor imply any provably false factual connotation. We agree.

We note at the outset that the issue of falsity is separate from the issue of whether the broadcasts were defamatory. For example, while falsity is typically an issue in both claims for defamation and trade disparagement, because the claims differ in other respects, compare Burns v. McGraw Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983) with Teilhaber Manufacturing v. Unarco Materials Storage, 791 P.2d 1164 (Colo. App. 1989), a false statement may provide the basis for a claim of trade disparagement but be insufficient to state a claim of defamation. See Restatement (Second) Torts §623A comment g (1976)("Although it might be possible to imply some accusation of personal incompetence or inefficiency in nearly every imputation directed against a business or a product, the courts have insisted that something more direct than this is required for defamation.")

The trial court dismissed plaintiff's complaint based solely on its conclusion that the broadcasts did not imply any statement of material fact susceptible of being proved false. This is the only issue the parties have addressed on appeal, and our review will be limited to that issue.

A.

The United States Supreme Court in Milkovich v. Lorain Journal Co., ____ U.S. ____, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) rejected the creation of an artificial dichotomy between "opinion" and fact. It concluded that, regardless of characterization as opinion or fact, a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least when a media defendant is involved. Loose, figurative, or hyperbolic language is entitled to full constitutional protection if, when considered in context, it would not be understood in its literal sense and does not contain a provably false factual connotation.

Our supreme court had earlier reached a similar conclusion in determining that a statement can support a claim for defamation only if the statement can be interpreted by a substantial number of members of the community and by the jury as a statement of fact susceptible to proof or disproof. Burns v. McGraw-Hill Broadcasting Co., supra.

Whether plaintiff's allegations are sufficient to remove the telecasts from the protection of the First Amendment is a question of law which requires that we conduct an independent examination of the record. See Milkovich v. Lorain Journal Co., supra; Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315 (Colo. 1981). To determine whether the telecasts contain any provably false factual connotation we must consider their circumstances and factual context. See Burns v. McGraw-Hill Broadcasting Co., supra.

In regard to those circumstances, we note that there is no evidence that the group which heard one broadcast was

identical to the group that heard the other. Each is therefore a single publication. See Restatement (Second) of Torts §577A and comment d (1977). Thus, as counsel for both parties conceded during oral argument, each broadcast must be separately analyzed.

B.

The words "scam" and "taken" in the first broadcast, considered alone, do not necessarily imply facts susceptible of being proved false. See Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir. 1992). However, the trial court's conclusion that the statements and the telecast are constitutionally protected is correct only if neither the statements in the context of the entire telecast nor the substance or gist of the telecast including the statements contain or imply any provably false factual connotation. See Milkovich v. Lorain Journal Co., supra; Burns v. McGraw-Hill Broadcasting Co., supra. The resolution of this issue requires that we first determine the substance or gist of the first newscast.

Defendants described plaintiff in the initial telecast as an "entrepreneur," selling a package of information, forms and services that was "unnecessary," the sale a "scam," amounting to people being "totally taken." A jury could properly find that the substance or gist of these statements, together with the other assertions in the telecast, is that a company with no expertise is packaging and selling information, forms, and services which, individually or collectively, are not worth paying anything for, because everything in the package can be obtained at little or no cost elsewhere or is unnecessary to meet the needs of the public. The report also implies that the content and purpose of

anything in plaintiff's package worth paying for has been fully disclosed during the telecast.

Plaintiff points out that the telecast fails to disclose why the conclusion is reached that plaintiff's entire package is unnecessary. The argument, in effect, is that the telecast implies material assertions susceptible of being proved false, and that the substance or gist which can reasonably be inferred from these assertions together with the other statements in the telecast is susceptible of being proved false. We agree.

In the telecast, defendants acknowledge that plaintiff's package includes a quarterly newsletter, but there is no indication of its contents or purpose. There is no reference at all to the central registry. The trial court in its finding describes the newsletter as being "of unknown content and nature" and the central registry as being "of unknown nature." However, in plaintiff's verified complaint the purpose of the newsletter is specifically described as informing customers "on a regular basis of any . . . changes in living will laws, and other developments in issues generally relating to living wills and one's legal right to decide about dying." The central registry is described in the complaint as fulfilling the need to apprise customers "of any changes in laws or medical technology affecting their living wills."

The trial court's dismissal of plaintiff's complaint was also based in part on its finding that the living will form and the durable power of attorney were available from University Hospital free of charge. However, plaintiff in its verified complaint alleges that, in fact, neither the University Hospital nor the C.U. Health Sciences Center at any time provided the form for a durable power of attorney.

The telecast mentions the medical directive that plaintiff provides and offers a doctor's opinion that it and the power of attorney forms are "unnecessary, certainly not worth paying for." The reporter later in the broadcast states that the living will forms offered free of charge "are really all you need. If there's anything else you wish to add, just add it." At no time is the content or purpose of the medical directive or the power of attorney forms disclosed so that a viewer can form an independent opinion about their utility. Under these circumstances, a jury could find the implication to be that no reasonable consumer informed of the content and purpose of these forms would find them useful and could further find this connotation to be false.

The telecast also implies that the living will form available from other sources mentioned in the story was the equivalent of plaintiff's. Plaintiff argues that none except that available from University Hospital and C.U. Health Sciences Center was the equivalent. The others were out of date because they did not reflect the current version of the Colorado living will statute, which had been amended in 1989, including the new statutory requirement that two physicians must certify the patient's incapacitation for a period of seven consecutive days. See §15-18-104, C.R.S. (1987 Repl. Vol. 6B). Plaintiff's form also includes three choices concerning artificial nourishment and hydration as set out in the current version of the same statute. Only the forms from University Hospital and C.U. Health Sciences Center contained the choices.

There is a mention in the telecast of a "wallet i.d. card so people know you have a living will." However, there is no indication of its contents or other purposes.

Finally, in describing plaintiff as an entrepreneur and not a doctor or lawyer, there is no indication of the time and effort plaintiff spent in consulting with attorneys and medical specialists in developing it package of product, which plaintiff alleges was substantial. A jury could reasonably find that this implies plaintiff had accumulated no specialized knowledge about living wills and related documents and that the implication is false.

There is no requirement that there by a disclosure of every fact involved in an investigative story. Here, however, the telecast implied that the content and purpose of everything in plaintiff's package that might be worth paying anything for, as well as the facts relevant to plaintiff's knowledge and expertise in the area, had been fully disclosed during the investigative story. Under the record before us, a jury could properly find that implication to be false.

In sum, the statements referring to plaintiff's business as a "scam" and its customers being "totally taken" were in the context of a supposedly objective investigative story which contains or implies material assertions susceptible to being proved false. The substance or gist of the story which a jury could reasonably infer from these statements and assertions is susceptible of being proved false. Thus, the telecast does not fall within the protection of the First Amendment for statements containing no provably false factual connotation. The complaint as to this telecast therefore should not have been dismissed on the basis of lack of provable falsity.

C.

Plaintiff argues that the second broadcast is misleading in several respects, including the failure to

indicate the differences between its forms and those provided by others. For example, plaintiff alleges that the living will forms of Porter Hospital, Denver Public Library, Journal of American Medical Association, and Harvard Medical Center did not reflect the waiting period in the current Colorado statute or the choices in regard to nutrition.

Plaintiff also alleges in its verified complaint that a form for a durable power of attorney was never available at University Hospital, C.U. Health Sciences Center, or Porter Hospital. In addition, while the medical directive was described as unnecessary, its contents and purpose were not disclosed. A jury again could find that this statement implies that no reasonable customer informed of the content and purpose of the medical directive would find it useful, and could further find that this implication is false. Finally, defendants in this report, in addition to not disclosing the content and purpose of each of the forms discussed, failed even to mention the personal identification card, the central registry, or the newsletter.

The substance or gist of the second telecast is therefore the same as the first: a company with no expertise is packaging and selling information, forms, and services which, individually or collectively, are not worth paying anything for, because everything in the package can be obtained at little or no cost elsewhere or is unnecessary to meet the needs of the public. The report again implies that everything in plaintiff's package worth paying anything for has been fully disclosed during the telecast.

We again conclude that the broadcast contains or implies material assertions susceptible of being proved false, and the substance or gist of the story which a jury could reasonably infer from these assertions and other statements

in the telecast is susceptible of being proved false. Therefore, the complaint should not have been dismissed on the basis of lack of provable falsity.

II.

Plaintiff also complains that the trial court's stay of discovery erroneously denied it the opportunity to obtain discovery and present material pertinent to defendants' motion. We address the issue because it is likely to arise again on remand.

The court's reasoning in granting the stay was that information plaintiff sought on defendants' state of mind was immaterial to the court's analysis of whether the contents of the broadcast were true or constituted protected opinion. Thus, discovery on culpability was not pertinent to the resolution of the motion to dismiss.

To the extent plaintiff seeks discovery pertaining to defendants' state of mind, we agree with the court's conclusion that such discovery is not pertinent to the issue of falsity. However, on appeal, plaintiff also asserts that it should be entitled to discovery regarding whether or not the broadcasts were false.

Plaintiff did not raise this argument with the trial court until it filed a motion for reconsideration after the court had entered its order dismissing the complaint. Nevertheless, because the issue may arise on remand, we address it here.

We are mindful of the cost to a defendant of immediate unlimited discovery and the court's goal in entering the stay of discovery of not unnecessarily wasting the time and resources of the parties or the court. However, on the issue of falsity plaintiff apparently seeks production

only of several hours of original unedited video and audio tapes and internal production memoranda and records. We agree that these materials may contain information which is relevant to the issue of falsity and admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence. See C.R.C.P. 26. Limited discovery on the issue of falsity is therefore appropriate. Any issues regarding privilege or the need for protective orders as to this or other discovery plaintiff seeks regarding falsity are for the trial court to determine in the first instance.

The judgment dismissing plaintiff's complaint based on lack of provable falsity is reversed, and the cause is remanded for further proceedings consistent with this opinion.

JUDGE CRISWELL concurs.

JUDGE ROTHENBERG dissents.

JUDGE ROTHENBERG dissenting

I respectfully dissent.

In a well-reasoned opinion, the trial court stated inter alia:

> [S]tatements of opinion relating to matters of public concern are not actionable if the opinion has no provably false factual connotation or truthful facts supporting the opinion [are] set forth.
>
> (cites omitted). . . . Here the court concludes as a matter of law that the use of the words 'scam' and 'taken' in the context of the whole telecast show [the doctor's] words to be rhetorical hyperbole and protected opinion, not assertions of fact. [The doctor's] expertise is disclosed as well as his interest and concern in the area. The underlying basis of his opinions are disclosed in that [the doctor] and defendant McCarroll state that all of the services and products provided by the plaintiff are not necessary to accomplish the desired ends of allowing individuals to predetermine the nature and extent of medical care and treatment. . . .

There exists substantial authority from a number of jurisdictions consistent with the trial court's analysis. See Letter Carriers v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745, (1974) (use of the word "traitor" in literary definition of a union "scab" not basis for defamation action since it was "merely rhetorical hyperbole"); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) (newspaper's reference to local developer's negotiating position as "blackmail" was merely rhetorical hyperbole, and not libelous); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 728 (1st cir. 1992) (critic who described musical comedy version of Broadway show as a "rip-off, a fraud, a scandal, a snake-oil job" did not commit libel because commentary was "figurative and hyperbolic" and there is "no objective evidence to disprove it"; terms "fake" or phony" similarly unprovable since they "admit of numerous interpretations"); McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987) ("The lack of precision makes the assert 'X is a scam' incapable of being proven true or false."). See also Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) for exhaustive discussions of the differences between opinion and fact in the context of a libel action brought by a public figure against a newspaper. But see Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc. 738 F. Supp. 1499, 1506 (D. S.C. 1989) (terms "scam" and "rip-off" have ascertainable meaning and can be identified as either true or false).

These on-point holdings and the trial court's reasoning convince me that the dismissal of plaintiff's claims should be affirmed. Further, although two discrepancies do exist between the trial court's findings and the information

presented by the plaintiff, I consider them relatively minor in the context of this dispute.

APPENDIX

Transcript of First News Broadcast - 4/23/91

Newscaster

Larry Green: And there's lots of news still ahead in our next half hour. Living wills give you the chance to have control over your own life but should you pay to get one?

[Commercial Break and News]

Larry Green: Living wills have become a popular and legal way of maintaining some control over your dying days. They allow you to make difficult life and death decisions. Do you want to be kept alive on life support systems? Artificially fed? Hospitals and libraries throughout the metro area offer living will forms free of charge. And now, a new Denver company is capitalizing on the living will trend, charging $29.95. Is it worth it? News 4's Suzanne McCarroll is here with more on the story

Defendant

Suzanne McCarroll: Well, Larry, some in the business of medical ethics say that this is really exploiting people's fear of death. But the president of the company says it's an altruistic service providing forms

for people to make difficult decisions. He says $29.95 is a nominal fee.

In the past six months the staff at the CU Health Sciences Center has sent out 10,000 living will forms free of charge; you need only provide a stamp. Just this month Merrill Hastings has opened the Living Will Center. He too will send out living will forms. He'll provide the stamp, you need to provide $29.95.

Merrill Hastings (Living Will Center Representative): . . . It's done on a stronger piece of paper . . .

Suzanne McCarroll: Hastings acknowledges that his living will form reads the same as the form hospitals and libraries offer free of charge. But he points out the print is bigger and with it comes a quarterly living will newsletter and this wallet I.D. card so that people know you have a living will. The $29 packet also comes with this form for appointing a durable power of attorney -- someone to make final decisions for you if you can't. This same form is available free of charge at the CU Health Sciences Center. And next, the packet includes this medical directive.

Merrill Hastings: . . . and on it is a choice of the treatments that you may wish to take or not wish to take -- and how long you want to take them for. This is not a legal document -- it's a road map for the patient.

Dr. Frank Marsh: . . . I think it's a scam. . . .

Suzanne McCarroll: Dr. Frank Marsh is a medical ethicist. He has reviewed these forms and is disgusted. He says the medical directive and power of attorney forms are unnecessary -- certainly not worth paying for.

Dr. Frank Marsh: . . . And they will send in $29.95 and what they get back is they've been taken -- is what is amounts to -- totally taken!

Suzanne McCarroll: Marsh teaches a course to medical students at CU's Med School. In it he advocates the use of living wills, but he does not advocate paying for the practice.

Dr. Frank Marsh: It's a way to make money. They seize on the term "will" and they look at it and they think that -- well this is cheap, I don't have to go to a lawyer -- $29.95 looks cheap for a will and they don't have to pay a penny -- not one red cent for it.

Suzanne McCarroll: Now, those in the medical ethics community say the living will forms

offered free of charge are really all you need. If there's anything else you wish to add, simply add it. You don't need a special form to do that. And, again, the Harvard Medical School sends out a living will packet for $5.00. The American Medical Association has information on living wills. And in Denver the CU Hospital, CU Health Sciences Center, will send you out a living will form free of charge. Again, that local address is: University Hospital, in care of Living Wills, 4200 East Ninth Avenue, Box A092, Denver, Colorado 80262. And from the people we talked to it's not that there's anything wrong with these forms, they're just saying that $29.95 is an unnecessary charge for a service you can provide or find free of charge in the community

Larry Green: Does Hastings have a medical or legal background?

Suzanne McCarroll: Neither, he's kind of an entrepreneur and has done various business ventures, but he admits he's not a lawyer nor a doctor.

Larry Green: Let's give him the benefit of this doubt then. Will he hold your hand over the telephone while you're trying to fill out the forms? Is there some

sort of information that comes along, besides just the form?

Suzanne McCarroll: Well it's the form and a letter of direction. It's sort of a toll free number you call, you get your form mailed out, but they don't provide over-the-phone, ongoing counseling.

Larry Green: Okay. All right. So we still have a chance though to get this for $29.95 cheaper from University officials here?

Suzanne McCarroll: Right.

Larry Green: All right. Thank you very much.

Transcript of Second News Broadcast - 4/24/91

Newscaster

Kristin McCloskey: And there's lots of news still ahead in our next half hour. Wondering how you can get a living will and a durable power of attorney for free? We'll show you coming up.

[Commercial Break and News]

Larry Green: Yesterday, we told you about a company that will sell you living will forms for $29.95. And we told you you could get those forms for free at the University of Colorado Health Science Center. Well, a lot has happened since our report yesterday and Suzanne McCarroll is here now to tell us all about it.

Suzanne McCarroll: Well, Larry, yesterday we showed you one company in town that charged $29.95 for a living will kit. Now that kit includes a living will, a durable power of attorney and a medical directive form. Now, the durable power of attorney form allows you to name someone to make medical decisions should you not be competent. The medical directive form lets you list what medical procedures you would or wouldn't want.

We then talked to Dr. Frank Marsh, a medical ethicist at University Hospital. He told us the medical directive form was unnecessary, but you can pick up the other two forms free of charge at the hospital. This is where the story gets complicated.

Merrill Hastings who runs the company that charges $29.95 for the forms called us and challenged is saying you couldn't get those forms at University Hospital. We checked back with University Hospital this morning -- a spokesman there said that as of today they have reversed their position. As of this afternoon, they are no longer providing the durable power of attorney form -- only the living will form. But there is a way to get all the necessary forms free of charge or for just a nominal fee. You don't have to pay $29.95.

At Porter Memorial Hospital you simply walk in the lobby and pick up the durable power of attorney form and the living will form off the rack. Hospital personnel say the forms are free and very popular.

Ed Christian

(Porter Memorial

Hospital): . . . feel very important that patients have the right to control the destiny of their lives. And if we can encourage them to take that action, then it works out well for everybody.

Suzanne McCarroll: The Denver Public Library has the forms available at the Social Science desk on the third floor of the main library downtown. The forms are in this book. You need only come up with $.20 to xerox the two pages. Ask the librarian for help if you need it.

Marilyn Chang (Librarian): If you were to telephone us, we could fax a copy to one of our branches and you could pick it up there. So we make it very convenient for you.

Suzanne McCarroll: You can also write Harvard Medical School for living will forms. They will send you a living will form, a medical directive and a durable power of attorney form. They packet is $5.00 for two sets. The forms have been published by the Journal of the American Medical Association.

It also includes this medical directive which walks you through a variety of medical scenarios. You can check the medication or treatment you would or wouldn't want.

Again, University Hospital is still providing living will forms free of charge. A spokesperson there says they are no longer handing out those durable power of attorney forms because it enables someone to carry out your wishes. The hospital staff says while they're valid forms you should first talk to an attorney before making such an important decision. But those forms are still available elsewhere.

If you want the living will form and the durable power of attorney form go to Porter Hospital or your local library. If you want all three forms, including that medical directive, you can write to Harvard Medical School, and of course Harvard Medical School, Boston, Massachusetts.

Larry Green: All right. Thank you very much.

Suzanne McCarroll: Mm. hmm.

COLORADO COURT OF APPEALS
No. 92CA0139

The Living Will Center, a Limited Liability Company,

Plaintiff-Appellant,

v.

NBC Subsidiary (KCNC-TV), Inc. and Suzanne E. McCarroll,

Defendants-Appellees.

Appeal from the District Court
of Jefferson County
Honorable James D. Zimmerman, Judge
No. 91CV1686

Division III
Opinion by JUDGE BRIGGS
Criswell, Jr., Concurs
Rothenberg, J., dissents

JUDGMENT REVERSED
AND CAUSE
REMANDED WITH
DIRECTIONS

Opinion Modified, and As Modified,
Petition for Rehearing DENIED
Rothenberg, J., would GRANT

Bloom Murr & Accomazzo, P.C., Eric P. Accomazzo, Denver, Colorado; Edward Dale Parrish, P.C., Edward Dale Parrish, Denver, Colorado for Plaintiff-Appellant

Holme Roberts & Owen, Kevin Michael Shae, Jon Bernhardt, Denver, Colorado, Anne H. Egerton, Marjorie Nieset Neufeld, Burbank, California, for Defendants-Appellees

OPINION is modified as follows:

Beginning on page 7, 8 lines from the top of the page, the following deletions (shown by overstriking) are made:

defamation only if the statement can be interpreted ~~by a substantial number of members of the community and by the jury~~ as

liability under state defamation law, at least when a media defendant is involved. Loose, figurative, or hyperbolic language is entitled to full constitutional protection if, when considered in context, it would not be understood in its literal sense and does not contain a provably false factual connotation.

Our supreme court had earlier reached a similar conclusion in determining that a statement can support a claim for defamation only if the statement can be interpreted as a statement of fact susceptible to proof or disproof. Burns v. McGraw-Hill Broadcasting Co., supra.

Whether plaintiff's allegations are sufficient to remove the telecasts from the protection of the First Amendment is a question of law which requires that we conduct and independent examination of the record. See Milkovich v. Lorain Journal; Co., supra; Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315 (Colo. 1981). Top determine whether the telecasts contain any provably false factual connotation we must consider their circumstances and factual context. See, Burns v. McGraw-Hill Broadcasting Co., supra.

In regard to those circumstances, we note that there is not evidence that the group which head one broadcast was identical to the group that heard the other. Each is therefore a single publication. See Restatement (Second) of Torts § 577A and comment d (1977). Thus, as counsel for both parties conceded during oral argument, each broadcast must be separately analyzed.

DISTRICT COURT, COUNTY OF JEFFERSON, STATE OF COLORADO
Case No. 91 CV 1686, Division 6

JUDGMENT OF DISMISSAL

THE LIVING WILL CENTER, a Limited Liability Company,

Plaintiff,

vs.

NBC SUBSIDIARY (KCNC-TV), INC., and SUZANNE McCARROLL,

Defendants.

This matter is before the court on the defendants' motion to dismiss. The court has reviewed the pleadings on file, the evidentiary information submitted to the court by the parties, and the briefs filed by the parties with the court. The court finds it is adequately advised in the matter, deems oral argument unnecessary, and enters the following judgment on the motion to dismiss.

The plaintiff has brought claims for damages arising out of television broadcasts concerning the plaintiff's business activities in selling forms and providing services which allow individuals to prepare instructions providing or allowing for future medical and surgical procedures that may be performed on them. The television broadcasts were aired by the defendant NBC Subsidiary (KCNC-TV) and the

reporter on the telecasts was the defendant Suzanne McCarroll. The plaintiff brings its claims based on theories of libel, violations of the Colorado Consumer Protection Act, disparagement, and tortious interference with a prospective economic advantage or business opportunity. The defendants' motion to dismiss is based primarily on the grounds that the complaint fails to state a claim upon which relief can be granted.

The court concludes that, on a motion to dismiss for failure to state a claim upon which relief can be granted, if the parties present matters outside the complaint and those are not excluded by the court, the motion is to be treated as one for summary judgment and disposed of as provided in C.R.C.P. 56, as long as all parties are given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. C.R.C.P. 12(b); Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985); Alexander v. Morrison-Knudsen Co. 166 Colo. 118, 444 P.2d 397 (1968). Normally on motions for summary judgment, the moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such issue must be resolved against the moving party. Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988). However, once there is a clear showing that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law, the court may then grant such relief. Churchey v. Adolph Coors Co., supra.

It has been held in defamation cases involving public officials, public figures, and matters of public interest or concern that the plaintiff or claimant has the burden of showing by clear and convincing evidence that the publication was false and published with actual malice or a

reckless disregard of the truth on motions for summary judgment made by the defendant or publishing party. Pietrafeso v. D.P.I., Inc., 757 P.2d 1113 (Colo. App. 1988); DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 119 (1980). However, more recently the Supreme Court has indicated that neither the "clear and convincing" nor "preponderance of the evidence" standards are applicable to motions for summary judgment, but that all motions for summary judgment must be resolved on whether there is a genuine issue of material fact. Neves v. Potter, 769 P.2d 4047 (Colo. 1989). It is unclear to the court whether the requirement in defamation cases that falsity and the requisite culpability be established by clear and convincing evidence on motions for summary judgment is still applicable. Therefore the court determines that it is appropriate to resolve the defendants' motion for dismissal on the standard of whether there is a genuine issue of material fact. A material fact is one whose resolution will affect the outcome of the case. Kane v. Saint Anthony Hosp. Systems, 738 P.3d 75 (Colo. App. 1987).

Here the parties have presented matters outside the complaint itself and asked the court to consider them. Therefore the court finds the motion must be treated as one for summary judgment. The court also finds the plaintiff has been given a reasonable opportunity to present all material pertinent to the motion. The discovery problems complained of in the plaintiff's brief relate to "the opportunity to obtain discovery on the state of mind of the defendants" (page 9 of plaintiff's brief in response to defendants' motion to dismiss). The defendants' arguments in their motion to dismiss go to the truth or falsity of the contents of the broadcast and whether the statements were protected opinion

and are not premised on malice, reckless disregard, or other state of mind. Therefore the requested discovery on state of mind or culpability is not pertinent to resolution of the motion to dismiss.

The court finds there is no genuine issue of material fact as to the following:

1. The plaintiff is a Colorado limited liability company whose business is to provide customers with forms to be used as living wills, durable powers of attorney for health care, and medical directives along with instructions on how to complete the forms. The plaintiff also provides its customers with a quarterly newsletter of unknown content and nature; with a central registry of unknown nature; and with a personal identification card which allows for information on the location of the person's living will, the name, address, and place of the person's doctor, and the name and address of the individual designated in the person's durable power of attorney. The identification card also contains a reduced form for a living will. The plaintiff charges $29.95 to its customers for this kit of information.

2. The defendant NBC Subsidiary (KCNC-TV), Inc., is a Colorado corporation in the business of television broadcasts, including news broadcasts. The defendant Suzanne E. McCarroll is an employee of the defendant KCNC-TV acting within the scope and authority of her employment as a news reporter.

3. Issues of living wills and related documents and an individual's ability to make decisions and give instructions about his or her future medical treatment and care, particularly in light of life-sustaining medical technology, are matters of public interest and concern and

the two telecasts complained of fall within the area of public interest and concern.

4. On April 23, 1991, the defendant, KCNC-TV, aired a television broadcast concerning the plaintiff and its business. Larry Green is a newscaster employed by the defendant KCNC-TV acting within the scope and authority of his employment. Dr. Marsh is a member of the Department of Preventive Medicine and Biometrics, Medical Ethics, at the University of Colorado School of Medicine.

5. The following statements were made on the broadcast of April 23, 1991, that the plaintiff objects to in whole or in part:

Larry Green: "And there's lots of news in our next half hour. Living Wills give you the chance to have control over your own life, but should you pay to get one?"

Larry Green: "Living wills have become a popular and legal way of maintaining some control over your dying days. They allow you to make difficult life and death decisions. Do you want to be kept alive on life support systems? Artificially fed? Hospitals and forms free of charge. And now, a new Denver company is capitalizing on the living will trend, charging $29.95. Is it worth it? News 4's Suzanne McCaroll is here with more on the story."

Suzanne McCarroll: "Well, Larry, some in the business of medical ethics say that this is really exploiting people's fear of death. But the president of the company says it's an altruistic service providing forms for people to make difficult decisions. He says $29.95 is a nominal fee."

"In the past six months the staff at the C.U. Health Sciences Center has sent out 10,000 living will forms free of charge. You need only provide a stamp. Just this month Merrill Hastings has opened the Living Will Center. He too will send out living will forms. He'll provide the stamp, you need to provide $29.95.

Merrill Hastings: "(inaudible) it's done on a stronger piece of paper."

Suzanne McCarroll: "Hastings ackowledges that his living will form reads the same as the form hospitals and libraries offer free of charge. But he points out the print is brigger and with it comes a quarterly living will newsletter and this wallet i.d. card so people know you have a living will. The $29.00 packet also comes with this form for appointing a durable power of attorney, someone to make final decisions for you if you can't. This same form is available free of charge at the C.U. Health Sciences Center and next, the packet includes this medical directive.

Merrill Hastings: "And on it is a choice of the treatments that you may wish to take or not wish to take and how long you want to take them for. This is not a legal document. It's a road map for the patient.

Dr. Frank Marsh: "I think it's a scam."

Suzanne McCarroll: "Dr. Frank Marsh is a medical ethicist. He has reviewed these forms and is disgusted. He says the medical directive and power of attorney forms are unnecessary, certainly not worth paying for.

Dr. Frank Marsh: "And they will send in $29.95 and what they get back is they've been taken - is what it amounts to - totally taken."

Suzanne McCarroll: "Marsh teaches a course to medical students at C.U.'s med school. In it he advocates the use of living wills, but he does not advocate paying for the practice."

Dr. Frank Marsh: "It's a way to make money. They seize on the term "will" and they look at it and they think that "well, this is cheap, I don't have to go to a lawyer." $29.95 looks cheap for a will and they don't have to pay a penny. Not one red cent for it."

Suzanne McCarroll: "Now those in the medical ethics community say the living will forms offered free of charge are really all you need. If there's anything else you wish to add, simply add it. You don't need a special form to do that. And, again, the Harvard Med school sends out a living will packet for $5.00. The American Medical Association has information on living wills. And in Denver, the C.U. Hospital, C.U. Health Sciences Center, will send you out a living will form free of charge. Again that local address is: University Hospital, in care of Living Wills, 4200 E. 9th Avenue, Box A 092, Denver, Colorado 80262. And from the people we talked to its not there's anything wrong with these forms, they're just saying $29.95 is an unnecessary charge for a service you can provide or find free of charge in the community."

Larry Green: "Does Hastings have a medical or legal background?"

Suzanne McCarroll: "Neither, he's kind of an entrepreneur and has done various business ventures, but he admits he's not a lawyer nor a doctor."

Larry Green: "Let's give him the benefit of this doubt then. Will he hold your hand over the telephone while you're trying to fill out the forms? Is there some sort of information that comes along, besides just the form?"

Suzanne McCarroll: "Well, it's the form and a letter of direction. It's sort of a toll free number you call. You get your form mailed out, but they don't provide over-the-phone, on-going counseling."

Larry Green: "Okay. All right. So we still have a chance though to get this for $29.95 cheaper from University officials here?"

Suzanne McCarroll: "Right."

Larry Green: "All right. Thank you very much."

6. On April 24, 1991, the defendant KCNC-TV aired a second television broadcast concerning the plaintiff and its business. Kristin McCloskey is a newscaster employed by the defendant acting within the scope and authority of her employment. Ed Christian is associated with Porter Memorial Hospital and is a spokesman for that entity. Marilyn Chang is employed as a librarian with the Denver Public Library.

7. The following are the statements made on the broadcast of April 24, 1991, that the plaintiff finds objectional in whole or in part.

Kristin McCloskey: "And there's lots of news still ahead in our next half hour. Wondering how you can get a

living will and a durable power of attorney for free? We'll show you coming up."

Larry Green: "Yesterday, we told you about a company that will sell you living will forms for $29.95. And we told you you could get those forms for free at the University of Colorado Health Science Center. Well, a lot has happened since our report yesterday, and Suzanne McCarroll is here now to tell us all about it."

Suzanne McCarroll: "Well, Larry, yesterday we showed you one company in town that charged $29.95 for a living will kit. Now that kit includes a living will, a durable power of attorney, and a medical directive form. Now, the durable power of attorney form allows you to name someone to make medical decisions should you not be competent. The medical directive form lets you list what medical procedures you would or wouldn't want."

"We then talked to Dr. Frank Marsh, a medical ethicist at University Hospital. He told us the medical directive form was unnecessary, but you can pick up the other two forms free of charge at the hospital. This is where the story gets complicated. Merrill Hastings who runs the company that charges $29.95 for the forms called us and challenged us saying you couldn't get those forms at University Hospital. We checked back with University Hospital this morning. A spokesman there said that as of today they have changed their position. As of this afternoon, they are no longer providing the durable power of attorney form, only the living will form. But there is a way to get all the necessary forms free

of charge or for just a nominal fee. You don't have to pay $29.95."

"At Porter Memorial Hospital, you simply walk in the lobby and pick up the durable power of attorney form and the living will form off the rack. Hospital personnel say the forms are free and very popular.

Ed Christian: "We feel it's very important that patients have the right to control the destiny of their lives. And if we can encourage them to take that action, then it works out well for everybody.

Suzanne McCarroll: "The Denver Public Library has the forms available at the social science desk on the third floor of the main library downtown. The forms are in this book. You need only come up with twenty cents to xerox the two pages. Ask the librarian for help if you need it."

Marilyn Chang: "If you were to telephone us we could fax a copy to one of our branches and you could pick it up there. So we make it very convenient for you."

Suzanne McCarroll: "You can also write to Harvard Medical School for living will forms. They will send you a living will form, a medical directive, and a durable power of attorney form. The packet is $5.00 for two sets. The forms have been published by the Journal of the American Medical Association. It also includes this medical directive which walks you through a variety of medical scenarios. You can check the medication or treatment you would or wouldn't want."

"Again, University Hospital is still providing living will forms free of charge. A spokesperson there says

they are no longer handing out those durable power of attorney forms because it enables someone to carry out your wishes. The hospital staff says while they're valid forms, you should first talk to an attorney before making such an important decision. But those forms are still available elsewhere."

"If you want the living will form and the durable power of attorney form, go to Porter Hospital or your local library. If you want all three forms, including that medical directive, you can write to Harvard Medical School, and of course Harvard Medical School, Boston, Massachusetts."

Larry Green: "All right. Thank you very much."

8. University Hospital does provide a living will form free of charge along with directions and admonitions on its use and did provide a durable power of attorney. The University of Colorado Health Sciences Center provides the same documents free of charge. Porter Memorial Hospital provides a form of living will and a durable power of attorney free of charge along with directions on how to use them. The Denver Public Library allows copying of forms for a living will and durable power of attorney, along with directions on how to use them from The Complete Legal Kit, The Consumer Law Foundation, for copying charges. The Harvard Medical School provides a medical directive and durable power of attorney for $5.00. Medical directive and durable power of attorney forms are available from Journal of the American Medical Association, Vol. 261, No. 22, 6/6/89. These include directions on how to use and fill out the forms.

The plaintiff's claims are based on defamation; violation of the Colorado Consumer Protection Act, C.R.S. 6-1-105; disparagement; and tortious interference with a prospective economic advantage or business opportunity. The court concludes that what must be shown on the defamation claim is that: (1) the defendants published or caused to be published a defamatory statement; (2) the defamatory statement caused the plaintiff actual damage; (3) the substance or gist of the statement was false at the time it was published; and (4) at the time of publication, the defendants knew the statement was false or the statement was made with reckless disregard as to whether it was false or not or published with actual malice. Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed. 2d 789 (1974); DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318 (1980). The court concludes that the requirements of falsity and actual malice or reckless disregard of the truth are applicable to the claims under the Colorado Consumer Protection Act, C.R.S. 6-1-105; for disparagement; and for tortious interference with a prospective economic advantage or business opportunity.

The Colorado Consumer Protection Act provides a state legislative remedy against those engaging in a deceptive trade practice by knowingly making a false representation as to the source, sponsorship, approval, or certification of goods or services or by knowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods or services or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith. C.R.S. 6-1-105(1)(b) and (1)(e). In Teilhaber Mfg. Co. v. Unarco Materials, 791 P.2d 1164 (Colo. App. 1989), the Colorado

Court of Appeals adopted the Restatement (Second) of Torts, §§623(A) and 624 and created a state tort remedy for disparagement. That tort requies proof of the following elements: (1) a false statement; (2) published to a third party; (3) derogatory to the plaintiff's business in general, to the title of its property, or its quality; (4) through which the defendants intended to cause harm to the plaintiff's pecuniary interest, or either recognized or should have recognized that it was likely to do so; (5) with malice; and (6) this, causing special damages. In Dolton v. Capital Fed. Sav. & Loan Assn., 642 P.2d 21 (Colo. App. 1981), the Colorado Court of Appeals held that tortious inference with a prospective business advantage was actionable in Colorado and thereby created a state tort remedy. In order to prove the tort it must be shown that there was an intentional and improper interference by the defendants with a prospective economic advantage or which prevented formation of a contract between the plaintiff and a third party or parties; such interference consisting of improperly and intentionally inducing or otherwise causing a third person or persons not to enter into or continue the prospective relation or preventing the other from acquiring or continuing the prospective relation. Wasalco, Inc. v. El Paso County, 689 P.2d 730 (Colo. App. 1984); Montgomery Ward v. Andrews, 736 P.2d 40 (Colo. App. 1987).

While the elements of these state remedies may not require proof of falsity or the requisite level of culpability as required in protected speech areas under the First and Fourteenth Amendments of the United States Constitution, the court concludes such requirements are applicable here. The court concludes that when the conduct complained of falls within a protected speech area and the subject of the

speech is a public official, public figure, or involves a matter of public interest or concern, then the elements of state created torts or actions do not remove it from the requirement that the statement be proven to be false and the statement be proven to have been made with actual malice or reckless disregard for its truth. Hustler Magazine v. Fallwell, 485 U.S. 6, 108 S. Ct. 876, 99 L.Ed. 2d 41 (1988). Cf Cohen v. Cowles Media Co., ____ U.S. _____, 111 S.Ct. 2513, _____ L. Ed 2d _____ (1991).

The Court of Appeals has already held that the constitutional protections offered a defendant in a defamation action are applicable to a defendant in a product disparagement action. Teilhaber Mfg. Co. v. Unarco Materials, supra. Also it appears other jurisdictions have held such protections are applicable on claims for tortious interference with an economic advantage or business opportunity. Middlesex Concrete Products and Exc. Corp. v. Cataret Industrial Ass'n., 37 N.J. 507, 181 A.2d 774 (1962); Tom Olesker's Exc. W.F. Inc. v. Dun & Bradstreet, Inc., 16 Ill. App. 3d 709, 306 N.E. 2d 549 (1973); Audition Division Ltd. v. Better Business Bureau, 120 Ill. App. 3rd 254, 75 Ill. Dec. 947, 458 P.2d 115 (1983). Therefore, because the court has found there is no genuine issue of material fact that the content of the telecasts were relating to matters of public interest or concern and clearly the complained of conduct is speech, the court concludes that no matter the nature of claims made by the plaintiff, the plaintiff must show in order to establish a cause for relief that the substance or gist of the statements was false at the time they were published and at the time of publication the defendant knew the statements were false or the statements

were made with reckless disregard as to whether they were false or not.

The court notes that the determination of whether a matter is of public interest or concern is a question of law for the court. Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975). The parameters of what constitutes a matter of public or general concern or public interest has not been defined by the appeal courts. Diversified Management v. Denver Post, Inc., 653 P.2d 1103 (Colo. 1982); Seible v. Denver Post Corp., 782 P.2d 805 (Colo. App. 1989). However under the circumstances of this case, as the court has already indicated, the court concludes as a matter of law the subject matter of the telecasts complained of by the plaintiff were matters of general concern and public interest and entitled to constitutional protection.

Therefore, the telecasts must have been false or at least not amounted to protected opinion in order for the plaintiff to maintain any of its claims. First, in determining whether the telecasts were false or not protected opinion, the court must consider them a whole and the court cannot dwell upon isolated parts of the telecasts. The court should give to each part its proper weight, so that the scope, content, and object of the whole statement is considered and given meaning which would be placed on it by persons of average intelligence and understanding. C.J.I. 3d, Civil, 22:10; Cinquanta v. Burdett, 154 Colo. 37, 388 P.2d 779; Downing v. Brown, 3 Colo. 571 (1877); 50 Am. Jur. 2d, Libel and Slander § 141 (1970). A statement considered in that matter is false if its substance or gist is contrary to the true facts, and other persons hearing the statement would be likely to think significantly differently about the entity referred to than

they would if they knew the true facts. The fact that a statement may have contained some false information does not necessarily make the substance or gist of the statement itself false. C.J.I.3d, Civil, 22:10A; Bowers v. Loveland Pub. Co., 773 P.2d 595 (Colo. App. 1989); Pietrafeso v. D.P.I., Inc., 757 P.2d 1113 (Colo. App. 1988).

Here the court finds that the substance and gist of the telecasts of April 23 and 24 are not false in that they were not contrary to the true facts. The telecasts, in addressing the products and services provided by the plaintiff which allow individuals through the use of forms to make decisions and give instructions on his or her future medical care and treatment, simply indicate there are alternatives available at substantially less cost or no cost that accomplish the same purposes and ends. There is no genuine issue of material fact that such alternative means are available and at substantially less cost. Therefore the substance and gist of the telecasts is true. Much of the plaintiff's complaint is to separately analyzed out of context specific statements, sentences, and words made in the telecasts. The court concludes that is not appropriate in determining the defamatory character of the broadcasts, but the telecasts must be viewed as a whole. In viewing the telecast while there may be some false or incomplete information, the court concludes that the substance and gist of the telecasts is not false.

Finally, while the use of the word "scam" by Dr. Frank Marsh may be defamatory per se (scam, n: a fraudulent or deceptive act or operation, Webster's Ninth New Collegiate Dictionary, Merriam Webster, Inc., 1990), the court concludes that the use of that word and the remainder of the statements by Dr. Marsh are

constitutionally protected opinion. The court concludes that statements of opinion relating to matters of public concern are not actionable if the opinion has no provably false factual connotation or truthful facts supporting the opinion as set forth. Milkovich v. Lorain Journal Co., ____ U.S. ____, 110 S. Ct. 2695, _____ L.Ed.2d _____ (1990); Brooks v. Paige, 773 P.2d 1098 (Colo. App. 1988). Whether a particular statement constitutes a fact or an opinion depends on the factual context of the publication and all the circumstances surrounding the statement. Burns v. McGraw-Hill Broadcasting Co., Inc., 659 P.2d 1351 (Colo. 1983); Seible v. Denver Post Corp., 782 P.2d 805 (Colo. App. 1989). The determination of whether a statement constitutes fact or opinion is a question of law. Brooks v. Paige, supra; Seible v. Denver Post Corp., supra. Loose, figurative, or hyperbolic language, when considered in context and not intended to be understood in its literal sense may amount to opinion. Milkovich v. Lorain Journal Co., supra; Brooks v. Paige, supra. Here the court concludes as a matter of law that the use of the words "scam" and "taken", in the context of the whole telecast show Dr. Marsh's words to be rhetorical hyperbole and protected opinion, not assertions of fact. Dr. Marsh's expertise is disclosed as well as his interest and concern in the area. The underlying basis of his opinions are disclosed in that Dr. Marsh and defendant McCarroll state that all of the services and products provided by the plaintiff are not necessary to accomplish the desired ends of allowing individuals to predetermine the nature and extent of medical care and treatment and that there is great public interest and concern in the area that would lead them to believe there was a need to obtain all of the services and products provided by the plaintiff at the cost charged. In the

context of the whole of the broadcasts, Dr. Marsh's statements present the viewpoint that there is no need for individuals to pay the charged costs by the plaintiff because there are alternatives at less costs that accomplish the same desired ends and because there is public interest and concern in the area individuals may feel the need to pay such amounts when they need not. Therefore the court concludes the statements of Dr. Marsh are nonactionable opinion amounting to rehetorical hyperbole and supported by disclosed truthful facts.

Finally, the court notes that if the standard remains on motions for summary judgment as announced in DiLeo v. Koltnow, supra, and Pietrafeso v. D.P.I., Inc., supra, i.e., that the plaintiff must show by clear and convincing evidence that the statements complained of are false or actionable opinion, then the plaintiff has made no showing in that regard that would allow the case to go forward.

Therefore the court concludes that the statements in the telecasts complained of by the plaintiff are not false or amount to nonactionable opinion and the defendants are entitled to dismissal as a matter of law. The defendants' motion to dismiss is ordered granted and judgment enters in favor of the defendants and against the plaintiff for dismissal of all claims plus allowable costs.

Dated this 21st day of October, 1991.

BY THE COURT:

/s/
JAMES D. ZIMMERMAN
District Court Judge

CERTIFICATE OF MAILING

I do hereby certify that on this 21st day of October, 1991, I did send a true and accurate copy of the foregoing Judgment of Dismissal, by depositing the same in the U.S. Mails, postage prepaid and addressed to the following:

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SUPREME COURT, STATE OF COLORADO

CASE NO. 93SC214

CERTIORARI TO THE COLORADO COURT OF APPEALS, 92CA0139

ORDER OF COURT

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL,

Petitioners,

v.

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR.,

Respondents.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS HEREBY ORDERED that said Petition for Rehearing shall be and the same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 6, 1994.

Justice Erickson, Justice Kirshbaum, and Justice Scott would grant the Petition.

cc:

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Supreme Court, U.S.
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(2)

No. 94-990

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR.,

Petitioners,

v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

RESPONDENTS' BRIEF IN OPPOSITION

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February 17, 1995

BEST AVAILABLE COPY

QUESTION PRESENTED

In a televised news report on a controversial public issue, can the quotation of a medical ethicist's comments conveying his views about a product's worth be actionable -- consistent with the First Amendment -- when the broadcast fully described the facts supporting the ethicist's opinion and presented the plaintiff's own contrary views?

RULE 29.1 LISTING

During the course of this action, the name of respondent NBC Subsidiary (KCNC-TV), Inc. was changed to NBC Stations Management, Inc. NBC Stations Management, Inc. is a wholly-owned subsidiary of National Broadcasting Company, Inc. The parent company of National Broadcasting Company, Inc. is National Broadcasting Company Holding, Inc., which is not a publicly held company. The parent company of National Broadcasting Company Holding, Inc. is General Electric Company, a New York corporation with its principal office in Fairfield, Connecticut.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR., *Petitioners*,

v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL, *Respondents*.

RESPONDENT'S BRIEF IN OPPOSITION

The respondents, NBC Subsidiary (KCNC-TV), Inc. and Suzanne McCarroll, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Supreme Court of Colorado's opinion in this case. The Colorado Supreme Court correctly applied governing law, including earlier Colorado cases and this Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), to conclude that an opinion based on fully disclosed underlying facts did not contain a provably false factual connotation, was figurative and hyperbolic in nature, and therefore was constitutionally protected. Contrary to petitioners' assertion, no conflict exists between or among the decision of the Colorado Supreme Court here and the decisions of this Court (including Milkovich), federal appellate courts, and other state supreme courts. Moreover, even if this Court were inclined to revisit Milkovich, this case affords no opportunity to explore any remaining uncertainty about constitutional protection for

"opinion" because it turns on an analysis of the particular facts involved and of Colorado law.

STATEMENT OF THE CASE

This lawsuit for libel and related claims under Colorado law arises from two television news reports about "The Living Will Center." The Living Will Center, a Colorado company run by publishing entrepreneur Merrill G. Hastings, Jr., sells "living will" forms and related documents for $29.95. In April 1991, Denver television station KCNC broadcast a story by reporter Suzanne McCarroll regarding The Living Will Center's sale of living will packets. In the introduction to the report, the KCNC anchorman noted that living wills had become popular and that hospitals and libraries in the Denver metropolitan area offered free living will forms. (Colorado provides by statute for a living will and offers a suggested form. See Colo. Rev. Stat. § 15-18-104 (1994).) He then referred to The Living Will Center's sale of living will packets for $29.95 and asked, "Is it worth it?"

McCarroll began her report by saying, "[S]ome in the business of medical ethics say that this is really exploiting people's fear of death. But the president of the company says it's an altruistic service providing forms for people to make difficult decisions. He says $29.95 is a nominal fee." In the report, McCarroll interviewed Living Will Center President Merrill Hastings as well as Dr. Frank Marsh, a medical ethicist and professor at the University of Colorado School of Medicine. Hastings described the documents provided by The Living Will Center, explained their function when used together, and defended the price charged. Marsh strongly disagreed.

Marsh commented, "I think it's a scam." McCarroll stated that Marsh had "reviewed these forms [in The Living Will Center's packet] and is disgusted. He says the medical directive and power of attorney forms are unnecessary -- certainly not worth paying for." Marsh then was quoted as

saying, "And they will send in $29.95 and what they get back is they've been taken -- is what it amounts to -- totally taken!" McCarroll went on to quote Marsh and others "in the medical ethics community" as saying that a living will form was all that was necessary. McCarroll also listed other sources in Denver and elsewhere from which viewers could get a living will form free or for a nominal five-dollar charge. The next day, KCNC aired a follow-up report in which it noted that one Denver hospital no longer provided a particular form and listed additional sources for free forms. (Transcripts of both broadcasts appear in the appendix to the Colorado Court of Appeals' decision, 857 P.2d 514, 521-24. See also Petition for Writ of Certiorari, Appendix ("Pet. App.") at 53-a - 61-a.)

The Living Will Center sued for libel and other state claims. Attached to its forty-five page verified complaint were twenty-five exhibits, including transcripts and a videotape of the broadcasts, copies of the items in the center's "living will" packet, and copies of the forms that KCNC had reported to be available elsewhere. Respondents moved to dismiss the case, arguing that Marsh's statements were not actionable because they were rhetorical hyperbole based on disclosed facts, and that the balance of the news reports either was not defamatory as a matter of law or was demonstrated by The Living Will Center's extensive exhibits to its own complaint to be substantially true. The District Court of Jefferson County, Colorado converted respondents' motion to dismiss to a motion for summary judgment and granted it. Petitioners appealed.[1]

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[1]The Living Will Center originally was the sole plaintiff. Petitioners were permitted to add Merrill Hastings as a plaintiff while the case was in the Colorado Court of Appeals.

The Colorado Court of Appeals reversed two-to-one. The two-judge majority concluded that the broadcasts implied assertions of material fact susceptible of being proved false and "[t]herefore, the complaint should not have been dismissed on the basis of lack of provable falsity." (Pet. App. at 48-a.) The court of appeals did not address whether any such "implie[d] material assertions" (id. at 47-a) were defamatory. The dissenting judge stated that she would have affirmed the dismissal because the words "scam" and "taken," in the context of the broadcasts as a whole, were hyperbolic statements of Marsh's opinion, based on disclosed facts, including the availability elsewhere of free living will forms. (Pet. App. at 50-a - 52-a.)

The Supreme Court of Colorado granted certiorari and reversed. In an opinion by Chief Justice Luis D. Rovira, the court remanded the case to the court of appeals with directions to reinstate the trial court's entry of summary judgment in respondents' favor. The court summarized the broadcasts at issue and then described its task as follows: "[W]e must first identify the appropriate standard for evaluating when defamatory statements are constitutionally protected under the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution and thus are not actionable." (Pet. App. at 8-a.) The court discussed the leading Colorado Supreme Court case on the "fact vs. opinion" distinction in libel law prior to this Court's decision in Milkovich: Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (1983). Justice Rovira noted that the Burns court had "adopted a contextual test" and that, even before Milkovich, "not all statements of opinion [had been] constitutionally privileged" under Burns. (Pet. App. at 9-a.) The court discussed Milkovich and then concluded that "the factors identified by the Burns court for distinguishing between facts and opinions remain applicable under the Milkovich test." (Id. at 10-a.)

The Colorado Supreme Court listed the relevant factors that a Colorado court should consider in determining whether a statement contains a provably false factual connotation: "the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a determination of whether the statement implies the existence of undisclosed facts which support it." (Id. at 12-a.) The court then applied the standard it had articulated in Burns and here to the KCNC broadcasts. It concluded:

> [W]e are convinced that the terms "scam" and "taken" as well as the substance and gist of the broadcasts neither contain [n]or imply a verifiable fact nor can they reasonably be understood as an assertion of actual fact about LWC's product. Therefore, we hold that the broadcasts are constitutionally privileged.

(Id. at 13-a.)

Citing to the "language of apparency" Marsh used in stating his personal views, the court also observed that Marsh's statements constituted his "subjective evaluation of the packet's worth" and that the broadcast fully disclosed the basis for Marsh's forcefully expressed opinions: that several of the forms The Living Will Center was selling -- including the only truly necessary document, a living will form -- were available at little or no cost elsewhere in the community. (Id. at 13-a - 14-a.)

The Colorado Supreme Court also considered the "substance and gist" of the two broadcasts in their entirety. The court concluded that the broadcasts' implication -- that The Living Will Center's packet was not worth paying for because Denver area hospitals and libraries gave away the key form -- was "not a verifiable fact." (Id. at 21-a.) The court noted that, "The worth of a given service or product is an inherently subjective measure which turns on myriad

considerations and necessarily subjective economic, aesthetic, and personal judgments." (Id.)

Finally, the court addressed petitioners' claims that the broadcasts contained factual inaccuracies, such as which particular forms were available at which locations. The court concluded that any such minor errors did not defame The Living Will Center, and the court declined to second-guess KCNC's editorial judgments about which small details to include or omit from its broadcasts. (Id. at 23-a.)

Three justices dissented on procedural grounds. None of the dissenters disagreed with the majority's articulation of the governing Colorado standard for analyzing "opinion" speech. To the contrary, they expressly "agree[d] with the majority's exposition of the law concerning the actionability of a claim for defamation." (Id. at 25-a.) The dissenters quarreled only with the district court's conversion of respondents' motion to dismiss to a summary judgment motion before discovery had been taken, which they asserted to be "contrary to [Colorado's] rules of civil procedure." (Id. at 28-a.)

The Colorado Supreme Court denied rehearing and issued its mandate on September 14, 1994. The court subsequently recalled the mandate, in response to a motion filed by petitioners, and stayed its reissuance for thirty days. On November 15, 1994, the Colorado Supreme Court denied petitioners' motion to extend the stay of the mandate's reissuance.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Colorado Supreme Court Properly Applied Federal And Colorado Law Governing Rhetorical And Hyperbolic Opinions Voiced On The Basis Of Disclosed Facts.

Petitioners attempt to elevate an unremarkable and fact-intensive analysis that involved, among other authorities, this Court's decision in Milkovich, to an issue worthy of certiorari. They cannot do so. In its Living Will Center decision, the Colorado Supreme Court examined pre-Milkovich Colorado law, concluded that it is fully consistent with Milkovich, and then correctly applied those legal standards to the specific facts of this case.

Milkovich involved a sports columnist's accusation that a local high school wrestling coach had lied under oath in a judicial proceeding. This Court held that, while there is no separate, across-the-board "opinion" privilege, the United States Constitution does provide absolute protection for certain types of opinion under the long-established law of defamation. The Court reaffirmed that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." 479 U.S. at 20 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)). The Court also reaffirmed its recognition of "constitutional limits on the type of speech which may be the subject of defamation actions." 497 U.S. at 16 (emphasis in original). Citing with approval its Bresler-Letter Carriers-Falwell line of cases,[2] the Court reiterated

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[2]Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (the word "blackmail" was "no more than rhetorical hyperbole, a vigorous epithet" and therefore was not actionable); Letter Carriers v. Austin, 418 U.S. 264 (1974) (words "scab" and "traitor" were not

that the Constitution protects "imaginative expression," "rhetorical hyperbole," and other "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." 497 U.S. at 17.

In the proceedings below, respondents argued that Dr. Marsh's comments were constitutionally protected speech under Milkovich as well as under pre-Milkovich Colorado cases, including the Colorado Supreme Court's decision in Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (1983). In Burns, the Colorado court had emphasized the importance of "[t]he surrounding circumstances and factual context" in determining whether a given statement is actionable as defamation. 659 P.2d at 1359. The Burns court also applied the distinction proposed by the Restatement of Torts between "[a]n opinion based on undisclosed facts" and "an opinion which is based on circumstances set forth by the publisher and which support the proffered opinion." Id. (quoting Restatement (Second) of Torts § 566 comment b (1976)).

Here, the Colorado Supreme Court first considered whether Burns was in accord with Milkovich. (Pet. App. at 8-1 - 13-a.) Concluding that it was, the court held that Burns remains the governing law in Colorado for the analysis of "opinion" speech. (Id. at 11-a - 12-a.) The court then applied that governing law to the facts here, including the context and the circumstances surrounding the broadcasts, and correctly concluded that Dr. Marsh's "scam" and "taken" remarks as well as the gist of the

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defamatory because they were used "in a loose, figurative sense"); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (parody, though crude and offensive, was not actionable).

broadcasts as a whole did not contain a provably false factual connotation regarding The Living Will Center.[3]

In reaching that conclusion, the Colorado Supreme Court carefully considered the context of the statements at issue. The lead-in to the report, ending with the question, "Is it worth it?", signaled to the viewers that the broadcast would present competing views on the controversial public issue of commerce in living wills. The KCNC broadcast included The Living Will Center's claim that it was providing a valuable service for a "nominal fee" as well as Dr. Marsh's contrary, critical view. Marsh was introduced as a "medical ethicist"; viewers thus expected moral and subjective, rather than legal and objective, observations from him. KCNC also told viewers the circumstances that supported Marsh's proffered opinion: that living will forms were available free and that those forms were "really all you need." In sum, the broadcast provided a statement of the facts underlying Marsh's slang terms. Thus, "scam" and "taken," in context, plainly represented Marsh's own value judgment about the worth of The Living Will Center's product.

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[3]Because the Colorado Supreme Court determined that the KCNC broadcasts were protected under article II, section 10 of the Colorado Constitution (Pet. App. at 8-a), an independent and adequate state ground supports the judgment below. Amicus curiae, the Colorado Broadcasters Association, expressly urged the Colorado Supreme Court to base its decision on the Colorado Constitution. See Brief of Amicus Curiae Colorado Broadcasters Association at 11-14. Respondents also noted in their brief on the merits below that article II, section 10 of the Colorado Constitution provided an independent basis for protecting Marsh's statements. See Opening Brief of Defendants/Petitioners NBC Subsidiary (KCNC-TV), Inc. and Suzanne McCarroll at 13 n.11. This independent non-federal ground is sufficient to sustain the judgment in respondents' favor and renders unnecessary any review by this Court of any federal issue raised below.

Petitioners' assertion that the Colorado Supreme Court failed to analyze "the social context of the statements, i.e., whether a viewer would expect rhetorical hyperbole in the context of a daily 'hard news' broadcast" (Petition at 8) turns the issue of context on its head. First, as detailed above, the court did consider the context of the statements, social and otherwise. (See Pet. App. at 13-a - 17-a.) In an effort to make this case into more than a fact-bound dispute, petitioners advance the implausible argument that a statement made in "a daily 'hard news' broadcast" -- as opposed to one made in a book or theater review, for example -- can never be constitutionally protected as rhetorical hyperbole under the Bresler-Letter Carriers-Falwell line of cases expressly reaffirmed in Milkovich. But those decisions of this Court say no such thing.

In fact, the Milkovich Court rejected just the kind of analysis-by-classification approach that petitioners propose. That a statement is made in an editorial, a critical review, or the like does not mean that it is automatically constitutionally protected[4]; conversely, that a statement is made in an afternoon local news broadcast does not mean that it is automatically actionable.[5] News reports on issues

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[4]Milkovich itself involved a sports page commentary rather than a front page "hard news" report. 497 U.S. at 4-5. See also Moldea v. New York Times Co., 22 F.3d 310, 313 (D.C. Cir.) (book review; "A writer may not commit libel at will merely by labelling his work 'a review'"), cert. denied, 115 S.Ct. 202 (1994).

[5]Courts have routinely found colorful and hyperbolic expressions to be constitutionally protected even though they were made in a news context. See, e.g., Chapin v. Knight-Ridder Inc., 993 F.2d 1087 (4th Cir. 1993) (Philadelphia Inquirer news report used term "hefty mark-up"); Brown v. Hearst Corp., 862 F. Supp. 622, 629 (D. Mass. 1994) (television station newsmagazine quoted police chief's statements suggesting that plaintiff killed his wife); Metcalf v. KFOR-TV, 828 F. Supp. 1515 (W.D. Okla. 1992) (local news series quoted doctor's views on physician plaintiff's practice, including statement

of public interest and concern[6] frequently present opposing views. If constitutional protection for those reported statements, made in connection with a controversial subject, disappeared merely because the statements appeared on the news, our print and broadcast press would be reduced to reporting on bake-offs and scout troop outings rather than national, state, and local political and social issues. The rule petitioners urge would eliminate the "imaginative expression" and "rhetorical hyperbole" that, as this Court has noted, have been a vital part of the "public debate . . . which has traditionally added much to the discourse of our Nation." Milkovich, 497 U.S. at 20 (quoting Hustler

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about "shams perpetrated on the public by greedy doctors"); Hickey v. Capital Cities/ABC, Inc., 792 F. Supp. 1195 (D. Or. 1992) (ABC News' "20/20" used terms "low," "repulsive," and "rotten" in referring to "black market in stolen pets" in which plaintiff was engaged), aff'd mem., 999 F.2d 543 (9th Cir. 1993); Lyons v. Globe Newspaper Co., 415 Mass. 258, 612 N.E.2d 1158 (1993) (Boston Globe article). Cf. Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir.) (Boston Globe articles that accused plaintiff of "blatantly misleading the public" and quoted theater critic's description of plaintiff's play as "a rip-off, a fraud, a scandal, a snake-oil job" were, in context, "not reasonably interpreted as stating 'actual facts' about [plaintiff's] honesty"), cert. denied, 112 S. Ct. 2942 (1992).

[6]Petitioners have conceded from the outset that the subject of the KCNC reports – the "right to die" and, in petitioners' parlance, "advance medical directives" (Petition at 3) – is a matter of public interest and concern. The district court also so found as a matter of law. See Judgment of Dismissal, Pet. App. at 69-a - 70-a ("Issues of living wills and related documents and an individual's ability to make decisions and give instructions about his or her future medical treatment and care, particularly in light of life-sustaining medical technology, are matters of public interest and concern[,] and the two telecasts complained of fall within the area of public interest and concern").

Magazine v. Falwell, 485 U.S. 46 (1988)). See also id. ("debate on public issues [must] remain 'uninhibited, robust, and wide-open'" (quoting New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

Finally, petitioners contend that the Colorado Supreme Court erred in concluding that the gist of the broadcasts as a whole did not state or imply verifiable defamatory facts about The Living Will Center. (Petition at 15-17.) Petitioners are wrong again. The Colorado Supreme Court noted "the juxtaposition of the disclosed facts that living will forms were available at little or no cost from local hospitals and libraries, that many medical ethicists were of the opinion that this form was all that was needed to implement a valid living will, and that LWC charged $29.95 for its product." (Pet. App. at 21-a.) The court then concluded that, given these facts, whether it was "worth it" to pay nearly thirty dollars for The Living Will Center's packet was an "inherently subjective" question "for viewers to answer for themselves." (Id. at 21-a, 17-a.) The court also noted that the answer to that question here might well vary from one viewer to another, depending -- for example -- on whether a viewer had more time than money. (Id. at 22-a.) The court did not, as petitioners contend, hold that "every statement regarding a product's worth is subjective and therefore not actionable." (Petition at 16.) The court merely determined that, under the circumstances of this case -- including the free availability of the only essential form -- the gist of the broadcasts was not objectively verifiable. Once again, this was a factual, not a legal, issue.[7]

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[7]The case petitioners cite -- United States Medical Corp. v. M.D. Buyline, Inc., 753 F. Supp. 676 (S.D. Ohio 1990) -- is readily distinguishable. There, a medical equipment industry newsletter stated that the defendant "consistently gouges customers on price and service." Id. at 677. The Ohio district court questioned whether the

In sum, petitioners' claims that the Colorado Supreme Court failed to consider context and misapplied Milkovich are just wrong. The court analyzed the context of the objected-to remarks for pages on end, and correctly applied Burns, which it found to be fully consistent with Milkovich. Petitioners' real quarrel is with the outcome of the court's analysis. But petitioners' dislike of the result does not render this case worthy of certiorari.

B. The Claimed Conflict Among The Colorado Supreme Court's *Living Will Center* Decision And The Decisions Of Federal Appellate And Other State Supreme Courts Does Not Exist.

There is no conflict between or among the Colorado Supreme Court's Living Will Center decision and the other federal and state decisions petitioners cite. (See Petition at 13-15.) Petitioners discuss at some length the opinions of the United States Court of Appeals for the District of Columbia Circuit in Moldea v. New York Times Co., 15 F.3d 1137 (D.C. Cir.) ("Moldea I"), modified, 22 F.3d 310 (D.C. Cir.) ("Moldea II"), cert. denied, 115 S. Ct. 202 (1994). But Living Will Center is entirely in accordance with Moldea II.

In Moldea II the District of Columbia Circuit affirmed the entry of summary judgment for The New York Times in a libel suit over a book review. The court -- like virtually every court to consider this issue -- recognized the

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newsletter was even a media defendant, but concluded that in any event the statements at issue did not address a matter of public concern. Id. at 680. Moreover, in M.D. Buyline the defendant simply asserted that the plaintiff overcharged customers; here, by contrast, KCNC presented Marsh's remarks -- as well as Merrill Hastings' opposing views -- in the context of a debate about commerce in living wills, a subject of public interest.

importance of context. The court also looked to the Bresler-Letter Carriers "hyperbole" cases, as did the Colorado Supreme Court here. Then, applying governing law to the particular circumstances there, the Moldea court concluded that the Times' reviewer's statements were not verifiably false. As noted above, the fact that a statement in a book review may, depending on the context, be constitutionally privileged does not mean that a statement in a news broadcast cannot be. Here, the Colorado Supreme Court cited Moldea II as consistent not only with Milkovich but also with its own earlier Burns opinion (Pet. App. at 11-a) and, applying the Burns factors -- including context, phrasing, and the surrounding circumstances -- correctly concluded that Marsh's loose, figurative, evaluative remarks were not actionable.

Petitioners' claim that Living Will Center is "directly in conflict" (Petition at 14) with the Illinois Supreme Court's decision in Kolegas v. Heftel Broadcasting Corp., 154 Ill.2d 1, 607 N.E.2d 201 (1992), is also wrong. Kolegas is readily distinguishable. Anthony Kolegas, a promoter of classic cartoon festivals, bought radio advertisements for a festival to benefit sufferers of Elephant Man disease. After one of the radio spots aired, Kolegas called the station and talked with the disc jockey on the air. When Kolegas said that the festival was to be a benefit for sufferers of Elephant Man disease, the disc jockey responded, "You're gone" and hung up. The disc jockey and his partner then stated on the air that Kolegas "was 'not for real,'" that he "was just 'scamming' them," and that "there was 'no such show as the classic cartoon festival'". 154 Ill. 2d at 7, 607 N.E.2d at 205.

The defendant's statement in Kolegas that "there was 'no such show as the classic cartoon festival'" is plainly one of verifiable fact, and the statements that Kolegas "was 'not for real'" and "was just 'scamming' them" must be read in that context. The disc jockeys' statements undoubtedly

"contain a provably false factual connotation" (Milkovich, 497 U.S. at 20): that no such festival existed. Here, by contrast, KCNC presented contrary views on the inherently subjective question of whether it was "worth it" to pay nearly thirty dollars for forms when the operative form was available free. Whether something is "worth" the asking price to any particular person is not objectively verifiable, as the Colorado Supreme Court correctly concluded; whether a cartoon festival really is taking place is. Both Living Will Center and Kolegas correctly applied Milkovich and both were correctly decided.

The other case that petitioners, in a footnote, contend conflicts with Living Will Center is the Arkansas Supreme Court's decision in Waymire v. DeHaven, 313 Ark. 687, 858 S.W.2d 69 (1993). (Petition at 15 n.17.) But Waymire did not even address the issue of constitutional protection for the statements involved there, which included allegations that the plaintiff was "an absolute con" and "an absolute crook," and "was trying to scam [the defendant] for $15,000.00" in connection with a real estate deal. 858 S.W.2d at 70. The Arkansas Supreme Court decided only that the defendant's statements could constitute defamation per se under Arkansas common law. The defendant did not argue -- and the court did not consider -- any constitutional protection for the statements at issue.

In sum, what petitioners characterize as a "conflict" is no more than a group of cases in which courts properly have undertaken a fact-intensive review of the entire context in which objectionable statements were made. Not surprisingly, as the facts and contexts have differed, so have the outcomes. Federal and state courts -- including the Moldea II panel -- have focused squarely on verifiability in analyzing "opinion" speech, and have properly considered context as one relevant factor. The Colorado Supreme Court's Living Will Center decision is fully consistent with this uniform body of law.

C. In Any Event, This Case Is Not An Appropriate Vehicle For This Court To Reconsider Or Clarify *Milkovich*.

Finally, even if this Court were inclined to take petitioners up on their invitation to "clarify" Milkovich (Petition at 7), this case is not the case in which to do so. First, the case turns on an analysis of the particular facts involved, including a comparison between the living will and related forms that petitioners were selling and those that local hospitals and libraries gave away. Second, the court decided the case by reaffirming and applying the leading Colorado case, Burns v. McGraw-Hill Broadcasting, which, in turn, relied on an earlier Colorado case, Bucher v. Roberts, 198 Colo. 1, 595 P.2d 239 (1979), and on the "opinion" analysis of the Restatement of Torts. The Colorado Supreme Court considered the Restatement distinction, adopted in Colorado's common law, between opinions based on undisclosed facts and those supported by disclosed facts, and correctly found Dr. Marsh's remarks not to be actionable. In other words, Living Will Center would have been decided the same way before Milkovich as it was after it. This case, therefore, will not produce an opinion that will guide the lower courts. The national impact of letting the Colorado Supreme Court's decision stand is zero. Living Will Center does not qualify for review by this Court.

CONCLUSION

For these reasons, this Court should deny the petition for a writ of certiorari.

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(3)

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR.

Petitioners,

v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL, *Respondents.*

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondent's opposition brief, instead of squarely addressing the arguments raised in Petitioners' brief, argues against straw-man issues that Petitioner did not assert. It also misstates the basis of the Supreme Court of Colorado's ruling.

I. THE IMPORTANCE OF SOCIAL CONTEXT

Petitioners have never claimed, as asserted by Respondents, that ". . . a statement made in a daily hard news broadcast . . . can never be constitutionally protected as rhetorical hyperbole under the Bresler-Letter Carriers-Falwell line of cases. . .".[1] Petitioners do maintain that the Supreme Court of Colorado erred when it failed to take into account that the broadcast statements were in the context of an investigative report on a daily television newscast, where

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[1]Opposition Brief, p. 10.

viewers expect statements of fact, not imaginative expressions of rhetorical hyperbole. This error led to the Supreme Court of Colorado's mistaken application of the principles announced by this Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

Petitioners have never claimed, as asserted by Respondents, that this Court should establish an "analysis-by-classification" approach[2] to the question of whether a statement is accorded constitutional protection as "opinion." To the contrary, Petitioners maintain, simply, that an analysis of social context, i.e., whether a statement appears in a forum where imaginative expression is expected or one where it is not, is a vital part of any correct application of the verifiability test announced in Milkovich.

The importance of the social context of a statement when applying the verifiability test is illustrated by comparing the correct analysis presented in the Moldea II decision (discussed in detail in the Petition) to the striking lack of social context analysis in Living Will Center. Moldea II did not establish in the D.C. Circuit a black and white rule that book reviews always contain only constitutionally protected opinion. Instead, it corrected the error of Moldea I by according substantial weight to the social context of the alleged defamatory statements in determining whether the statements were verifiable and therefore actionable under Milkovich. Petitioners seek the same sort of correction in this case.

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[2]Opposition Brief, p. 10.

II. THE SOCIAL CONTEXT OF THE BROADCAST WAS AN INVESTIGATIVE NEWS REPORT, NOT A DEBATE

Respondents mischaracterize the broadcasts as a debate between parties with opposing views on a public controversy.[3] The purpose of Respondents' misleading portrayal of the broadcasts is an attempt to take advantage of the latitude this Court has traditionally granted to imaginative and sometime vituperative expression occurring in debates and public disputes.[4] The broadcasts were, by no stretch of the imagination, a debate over a controversial issue.[5] They were, instead, a carefully created, meticulously edited, investigative news report about the conduct of a private business prepared by a veteran television reporter without any deadline pressure. The policy protecting free and inventive expression in the discussion of public issues has no application to what occurred here: a broadcast of Respondents' assertions,[6] prepared for Respondents' own

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[3]Opposition Brief, p. 13, fn. 7 ("KCNC presented Marsh's remarks . . . in the context of a debate about commerce in living wills. . .").

[4]See, e.g., cases cited in Opposition brief at p. 7, fn. 2: Bresler (use of term "blackmail" by political opponents to describe developer's tactics at a public hearing on zoning); Letter Carriers (use of term "scab" and "traitor" in context of a heated labor dispute).

[5]Contrary to Respondents' statements, the transcripts clearly show that the subject of the right-to-die was not mentioned in the broadcast, and Petitioners have never conceded that it was. Opposition Brief, p. 11, fn. 6.

[6]The fact that Dr. Marsh made the statements "scam" and "taken" does not shield Respondents from liability. It is basic tenet of libel law that a republisher of a libel is subject to the same liability as the original

purposes, warning the public that a private, local business was engaging in fraudulent and deceptive practices.

Respondents' mischaracterization of the social context of the broadcasts as a debate further underscores the importance of the social context in applying the verifiability test. Had these statements been made in an authentic television debate, like William F. Buckley's "Firing Line" program or CNN's "Crossfire" program, a viewer would have been alerted to expect hyperbole and imaginative expressions of opinion and the weight of the social context analysis would be in favor of constitutional protection for the statements.

Mr. Hastings never debated Dr. Marsh. In fact, they have never met. The interviews with Merrill Hastings and Dr. Marsh were separately pre-recorded and filmed entirely independent of each other. Then Respondents subtly interwove the video tapes prior to news time.

Further, Petitioners first learned of the accusations while viewing the actual newscast when it was reported that their business was "a scam", that their customers had "been taken . . . totally taken" and that their products were "unnecessary -- certainly not worth paying for." Petitioners were never given a chance to rebut these accusations on the air, even though they demanded such an opportunity immediately after the first newscast. Thus, no debate ever occurred.

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publisher. Restatement (Second) of Torts, § 578 (1977).

III. THIS WAS NOT "NEUTRAL REPORTAGE" OF A DEFAMATORY STATEMENT.

Respondents contend that they were simply reporting competing views on a matter of public interest.[7] Some courts have established a doctrine, known as "neutral reportage", which protects media defendants from libel claims when they are reporting newsworthy defamatory statements made by others.[8] However, media defendants must neutrally report the defamatory statements and may not espouse or concur with the defamatory statement if they are to avoid liability under this principle.[9] Here it is clear from the transcripts of the broadcast that Respondents openly supported the view that Petitioners' product was unnecessary and "certainly not worth paying for", and that "a scam" was being perpetrated on the public by Petitioners.[10]

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[7]Opposition brief, pp. 10-11 ("News reports . . . frequently present opposing views."),

[8]See, Edwards v. National Audubon Society, 556 F.2d 113 (2d Cir.), cert. denied sub nom Edwards v. New York Times, 434 U.S. 1002 (1977); R. Smolla, Law of Defamation, (Section 4.14, p. 4-68, Release #7, January 1994).

[9]See, Barry v. Time, Inc., 584 F.Supp. 1110, 1126-27 (N.D. Cal. 1984) ("It is the neutrality of the report which is critical.").

[10]Petition, p. 53-a (The station's newscaster opens the broadcast by stating: ". . .should you pay to get one? . . . a new Denver Company is capitalizing on the living will trend, charging $29.95." Respondent McCarroll: ". . . this is really exploiting people's fear of death."); Petition, p. 57-a (The station's newscaster summarizes the report by stating: "So we still have a chance though to get this [Petitioner's product] for $29.95 cheaper from University officials here?" Respondent McCarroll: "Right.") (emphasis added); Petition, p. 59-a (The reporter summarized the second broadcast by asserting the Respondents' views:

IV. THERE IS NO INDEPENDENT STATE GROUND FOR THE LIVING WILL CENTER DECISION.

Respondents contend that the Supreme Court of Colorado ruled that the Colorado Constitution was the ground for its ruling.[11] However, one searches in vain for language in the Living Will Center decision that supports this statement. The Supreme Court of Colorado interpreted and applied the Milkovich decision, not Colorado law.

After summarizing both state and federal law, the court's holding is that ". . . the terms 'scam' and 'taken' as well as the substance and gist of the broadcasts neither contain or imply a verifiable fact nor can they reasonably be understood as an assertion of actual fact about The Living Will Center's product. Therefore, we hold that the broadcasts are constitutionally privileged."[12] This is unequivocally a summary of the verifiability test announced in Milkovich, not a holding based on Colorado law.[13]

Respectfully submitted,

"But there is a way to get all the necessary forms free of charge or for just a nominal fee. You don't have to pay $29.95.").

[11]Opposition Brief, p. 9, fn. 3.

[12]Petition, p. 13-a.

[13]The Supreme Court of Colorado summarized the Milkovich verifiability standard as follows: "Under the Milkovich standard, therefore, a court must determine whether the statement contains or implies a verifiable fact about the plaintiff and second, whether the statement reasonably is susceptible to being understood as an actual fact." Petition, p. 10-a. The holding in Living Will Center uses the same language.

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